Supreme Court, U.S.
FILED
05-106 JUL 13 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INCORPORATED;
TRACEY MILLER; LAURENCE T. WIZAUER;
DAVID CROMBIE; PETER BRANDON;
THOMAS WILLETT; LAWRENCE R. MARTENIS,
PETITIONERS

v.

JAMES T. RODDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether federal courts have federal question jurisdiction over a claim pled under state law that involves interpretation or application of a collective bargaining agreement subject to the Railway Labor Act and hence constitutes a "minor dispute" subject to mandatory arbitration under Section 3 of that Act, 45 U.S.C. § 153.

PARTIES TO THE PROCEEDINGS

The only parties in the court below are listed in the caption to the petition.

STATEMENT UNDER RULE 29.6

Petitioner Grand Trunk Western Railroad Incorporated is a wholly owned subsidiary of Grand Trunk Corporation, a Delaware corporation. Grand Trunk Corporation is, in turn, a wholly owned subsidiary of Canadian National Railway Company, a Canadian corporation. No publicly held company owns 10% or more of the stock of Canadian National Railway Company.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

STATEMENT UNDER RULE 29.6 ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

i. Statutory Background 2

ii. Statement of Facts 4

iii. Course of Proceedings and Disposition Below 9

REASONS FOR GRANTING THE WRIT 13

I. The Sixth Circuit's Decision Places It On The Minority Side Of A Six-To-Three Circuit Split On An Important And Recurring Issue of Federal Law 13

A. Six Circuits Hold That State Law Claims That Constitute Minor Disputes Under The Railway Labor Act Fall Within Federal Question Jurisdiction 15

B. Two Other Circuits Preceded The Sixth Circuit In Holding That State Law Claims That Constitute Minor Disputes Under The RLA Fall Outside Federal Question Jurisdiction 18

C. This Deeply Entrenched Conflict Will Likely Persist Until Resolved By This Court 19

II. The Sixth Circuit's Decision Conflicts With Relevant Decisions Of This Court 20

A. This Court Has Held That Federal Courts Have Federal Question Jurisdiction To Enforce The RLA Obligation To Arbitrate Minor Disputes 21

B. This Court Has Held That Section 3 Of The RLA Has No Less Preemptive Force Than Section 301 Of The Labor-Management Relations Act, 29 U.S.C. § 185, Under Which State Court Actions Asserting Arbitrable Grievances Are Subject To Federal Question Jurisdiction 24

III. The Sixth Circuit's Decision Is Contrary To Congress's Intent to Make The Federal Courts Available To Enforce The RLA Dispute Resolution Process 27

CONCLUSION 30

APPENDIX

Appendix A – Sixth Circuit Opinion (01/14/05) 1a

Appendix B - District Court Order Denying Motion to Remand (10/04/02) 15a

Appendix C - Transcript of District Court Hearing on Motion to Remand (09/25/02) 16a

Appendix D- District Court Memorandum Opinion and Order Granting Summary Judgment (11/21/02) 28a

Appendix E- Adjustment Panel Award (08/26/03) 42a

Appendix F - Sixth Circuit Order Denying Rehearing (03/15/05) 47a

Appendix G - Statutory Appendix 49a

TABLE OF AUTHORITIES

CASES

AETNA CAS. & SUR. CO. v. FLOWERS, 330 U.S. 464 (1947) 12

ANDERSON v. AM. AIRLINES, INC., 2 F.3D 590 (5TH CIR. 1993) 17

ANDREWS v. LOUISVILLE & NASHVILLE R.R., 406 U.S. 320 (1972) 26

ARBOGAST v. CSX CORP., 831 F.2D 290 (UNPUBLISHED TABLE DECISION), REPORTED IN FULL AT 1987 WL 38662 (4TH CIR. 1987) 15, 16

AVCO CORP. v. AERO LODGE NO. 725, INT'L ASS'N OF MACHINISTS, 390 U.S. 557 (1968) 24

BEERS v. S. PAC. TRANSP. CO., 703 F.2D 425 (9TH CIR. 1983) 16

BENEFICIAL NAT'L BANK. v. ANDERSON, 539 U.S. 1 (2003) 25, 26

BHD. OF R.R. TRAINMEN v. CHICAGO RIVER & IND. R.R., 353 U.S. 30 (1957) 21

BHD. OF R.R. TRAINMEN v. HOWARD, 343 U.S. 768 (1952) 21

BURGOS v. EXEC. AIR, INC., 914 F. SUPP. 792 (D.P.R. 1996) 14

CALIFORNIA v. TAYLOR, 353 U.S. 553 (1957) 21, 28

CHILLE v. UNITED AIRLINES, 304 F. SUPP. 2D 466 (W.D.N.Y. 2004) 15

CONSOL. RAIL CORP. v. RY. LABOR EXECS. ASS'N, 491 U.S. 299 (1989) 2, 22

DEFORD v. SOO LINE R.R., 867 F.2D 1080 (8TH CIR. 1989) 16, 18, 20, 26

DETROIT & TOLEDO SHORE LINE R.R. v. UNITED TRANSP. UNION, 396 U.S. 142 (1969) 3

ELGIN, JOLIET, & E. RY. v. BURLEY, 325 U.S. 711 (1945) 3

ESPINAL v. N.W. AIRLINES, 90 F.3D 1452 (9TH CIR. 1996) 17

FRANCHISE TAX BD. v. CONSTR. LABORERS VACATION TRUST, 463 U.S. 1 (1983) 25

GEDDES v. AM. AIRLINES, INC., 321 F.3D 1349 (11TH CIR. 2003) 19, 22, 26

GORE v. TRANS WORLD AIRLINES, 210 F.3D 944 (8TH CIR. 2000) 11, 16, 26

GRABLE & SONS METAL PRODS., INC. v. DARUE ENG'G & MFG., NO. 04-603, SLIP OP. AT 9 (JUNE 13, 2005) 23

GRADDICK v. NEWMAN, 453 U.S. 928 (1981) 12

GRAF v. ELGIN, JOLIET & E. RY., 790 F.2D 1341 (7TH CIR. 1986) 15, 26

GROTE v. TRANS WORLD AIRLINES, INC., 905 F.2D 1307 (9TH CIR. 1990) 16

GUNTHER v. SAN DIEGO & ARIZ. E. RY., 382 U.S. 257 (1965) 29

HAWAIIAN AIRLINES, INC. v. NORRIS, 512 U.S. 246 (1994) 3, 26, 27, 28

INT'L ASS'N OF MACHINISTS v. CENTRAL AIRLINES, INC., 372 U.S. 682 (1963) 22, 23

LEU v. NORFOLK & W. RY., 820 F.2D 825 (7TH CIR. 1987) 15

MERRELL DOW PHARMS., INC. v. THOMPSON, 478 U.S. 804 (1986) 23

MERSMANN v. CONT'L AIRLINES, 335 F. SUPP. 2D 544 (D.N.J. 2004) 15

METRO. LIFE INS. CO. v. TAYLOR, 481 U.S. 58 (1987) 25

MOSES H. CONE MEM'L HOSP. v. MERCURY CONSTR. CORP., 460 U.S. 1 (1983) 29

PITTSBURGH & LAKE ERIE R.R. v. RY. LABOR EXECS. ASS'N, 491 U.S. 490 (1989) 22

PRICE v. PSA, INC., 829 F.2D 871 (9TH CIR. 1987) 17

RY. LABOR EXECS. ASS'N v. PITTSBURGH & LAKE ERIE R.R., 858 F.2D 936 (3D CIR. 1988) 18, 22

REPUBLIC STEEL CORP. v. MADDOX, 379 U.S. 650 (1965) 26

SCHROEDER v. TRANS WORLD AIRLINES, INC., 702 F.2D 189 (9TH CIR. 1983) 16, 17

SHAFII v. BRITISH AIRWAYS, PLC, 83 F.3D 566 (2D CIR. 1996) 17, 18

SIROIS v. BUS. EXPRESS, INC., 906 F. SUPP. 722 (D.N.H. 1995) 14

SKINNER V. RY. LABOR EXECS. ASS'N, 489 U.S. 602 (1989) 5, 6

SOLIMO V. METRO-NORTH COMMUTER R.R., 253 F. SUPP. 2D 733 (S.D.N.Y. 2003) 15, 18

TEXAS & NEW ORLEANS R.R. V. BHD. OF RY. & S.S. CLERKS, 281 U.S. 548 (1930) 26

THINGS REMEMBERED, INC. V. PETRARCA, 516 U.S. 124 (1995) 20

UNION PAC. R.R. V. SHEEHAN, 439 U.S. 89 (1978) 2

UNITED STATES V. CALIFORNIA, 297 U.S. 175 (1936) 28

VIRGINIAN RY. V. SYS. FED'N NO. 40, 300 U.S. 515 (1937) 28

STATUTORY PROVISIONS & REGULATIONS

9 U.S.C. §§ 1-12 29

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... *passim*

28 U.S.C. § 1441 ..... 1, 4

28 U.S.C. § 1447(d) 20

29 U.S.C. § 185 ..... 13, 21, 24

29 U.S.C. §§ 1001, *et seq.* 25

45 U.S.C. §§ 151, *et seq.*. 2

45 U.S.C. § 151a 2

45 U.S.C. § 151a(1) 2

45 U.S.C. § 151a(5) 3

45 U.S.C. § 152, Fourth 17

45 U.S.C. § 153 ..... *passim*

45 U.S.C. § 153, First (i) 3

45 U.S.C. § 153, First (p) 22, 29

45 U.S.C. § 153, First (q) 22, 29

45 U.S.C. § 153, First (x) 3

45 U.S.C. § 153, Second 17

45 U.S.C. §§ 181-88 2

49 U.S.C. § 20101, *et seq.* 5

49 C.F.R. § 219.9(a) 5

49 C.F.R. § 219.102 5

49 C.F.R. § 219.105(b) 5

Mich. Comp. Laws § 37.2205a 9

MISCELLANEOUS

53 Fed. Reg. 47102 6

Sup. Ct. R. 10(a) 14

Sup. Ct. R. 10(c) 21

16 James Wm. Moore *et al.*, *Moore's Federal Practice* § 107.14[4][b][v][D], at nn.265.1-.3 (3d ed. 1997 & Supp. 2005) 15

Eric J. Moss, *The Breadth of Complete Preemption*, 76 Va. L. Rev. 1601, 1618-25 (1990) 15

Federal Question Jurisdiction, 37 Loy. L.A. L. Rev. 1443, 1489 n.250 (2004) 26

I

PETITION FOR A WRIT OF CERTIORARI

Petitioners Grand Trunk Western Railroad Incorporated, Tracey Miller, Laurence T. Wizauer, David Cromie, Peter Brandon, Thomas Willett, and Lawrence R. Martenis respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 395 F.3d 318 (6th Cir. 2005). Both the district court's order denying respondent's motion to remand (App. 15a), and the transcript containing its bench ruling in support of that order (App. 16a-27a), are unreported, as is the district court's memorandum opinion and order granting petitioners' motion for summary judgment (App. 28a-41a).

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on January 14, 2005. The court of appeals denied a timely petition for rehearing on March 15, 2005. (App. 47a-48a.) Petitioners' time for filing a petition for certiorari was extended by Justice Stevens as Circuit Justice until July 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns 28 U.S.C. §§ 1331 and 1441, and Sections 1, 1a and 3 of the Railway Labor Act, 45

U.S.C. §§ 151, 151a and 153, all of which are reproduced in the Statutory Appendix (App. 49a-74a).

STATEMENT OF THE CASE

i. Statutory Background

This case concerns the Railway Labor Act of 1926 ("RLA"), as amended, 45 U.S.C. §§ 151, *et seq.* In the RLA, Congress established a comprehensive regime that governs employment under collective bargaining agreements ("CBAs") throughout the U.S. railroad and airline industries.[1] That regime serves the critically important national purpose of minimizing the risk that railroad or airline labor disputes could lead to "any interruption to commerce or to the operation of any carrier engaged therein." *Id.* § 151a(1). To that end, "Congress endeavored to promote stability in labor-management relations . . . by providing effective and efficient remedies for the resolution of railroad-employee [and airline-employee] disputes arising out of the interpretation of collective-bargaining agreements." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

In Section 3 of the RLA, Congress provided an exclusive federal system, founded on "compulsory arbitration procedures," *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 303 (1989), "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or

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[1] In 1936 Congress extended the RLA to the airline industry. *See* 45 U.S.C. §§ 181-88. Both the railroad and the airline industries are adversely affected by the decision of the court of appeals in this case and by the split in the circuits over the question presented.

application of [CBAs]," 45 U.S.C. § 151a(5).[2] Such disputes are known as "minor disputes." *See, e.g., Elgin, Joliet, & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994) (further defining minor disputes as disputes that "involv[e] the interpretation or application of existing labor agreements").[3] Because arbitration is mandatory, any claim brought under state law that "constitute[s] a minor dispute" is preempted by the RLA. *Id.* at 253.

This case presents an issue that now divides nine of the courts of appeals along a six-to-three split: whether federal courts have federal question jurisdiction over a claim pled under state law that involves interpretation or application of a CBA subject to the RLA and hence constitutes a minor dispute

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[2] Specifically, Section 3, First of the RLA establishes the National Railroad Adjustment Board ("NRAB"), and provides that all such disputes that cannot be resolved consensually are to be referred to it, *id.* § 153, First (i), to regional adjustment boards sitting under authority delegated by the NRAB, *id.* § 153, First (x), or to similar system, group or regional boards (including public law boards) established by voluntary agreement between railroad employers and unions, *id.* § 153, Second. Adjustment board awards are both enforceable and reviewable in federal district court. *Id.* § 153, First (p) & (q).

[3] "Minor disputes" are distinguished from "major disputes" not by their scope or importance – minor disputes frequently involve industry-wide issues affecting the terms under which railroad or airline employees are employed – but by their relationship to CBAs. Any dispute involving the interpretation or application of an existing CBA is "minor," whereas a dispute arising "out of the formation or change of" a CBA is "major." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 145 n.7 (1969).

subject to mandatory arbitration under Section 3 of the RLA, 45 U.S.C. § 153.

That issue arises when an employee files a state law claim against a railroad or airline employer and seeks relief from a state court instead of, or (as in this case) in addition to, filing the grievance before the adjustment board.

Six circuit courts have held that there is federal question jurisdiction over the employee's state law claim if it involves interpretation or application of a CBA subject to the RLA. As a result, district courts in those circuits are available, upon removal, 28 U.S.C. § 1441, to determine whether the claim constitutes a minor dispute and, if so, to enforce the exclusivity of the RLA-specified mechanisms for resolving such disputes.

Three circuit courts, including the Sixth Circuit in this case, have held that there is no such federal question jurisdiction. Therefore, the determination of what constitutes a minor dispute and enforcement of the federal dispute resolution system are left to the state courts within those circuits.

ii. Statement Of Facts

Petitioner Grand Trunk Western Railroad Incorporated ("GTW") operates railway lines in Michigan and three other states. GTW is a part of the railway system of Canadian National Railway ("CN"), which operates coast to coast in Canada and south from Canada through sixteen states in the United States to the Gulf of Mexico. CN's lines run in states located in

the Second, Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. The CN system, including GTW, is an integral part of the U.S. freight railway network, connecting directly with the six other major North American freight railroads that operate within the United States. Together, the major railroads interchange freight with hundreds of smaller railroads. Railroads carry freight in every state, and the U.S. freight railway system, in turn, interconnects with the railway systems of Canada and Mexico and is an essential foundation of much of the United States and North American economies. The freight railroads in the United States also provide tracks and other infrastructure facilities used by Amtrak and other passenger lines.

Improper train operation poses significant safety risks that arise from both the size and speed of the trains and the hazardous materials that frequently are shipped by rail. Accordingly, GTW, like other railroads operating in the United States, is subject to the provisions of the Federal Railroad Safety Act of 1970 ("FRSA"), now codified as amended at 49 U.S.C. §§ 20101, *et seq.* Regulations promulgated by the Secretary of Transportation under the FRSA prohibit railroad employees such as respondent from using "a controlled substance at any time, whether on duty or off duty," 49 C.F.R. § 219.102, and subject railroad employers such as GTW to civil penalties for violating the "duty of due diligence to prevent" such on- or off-duty drug use, *id.* §§ 219.9(a), 219.105(b). *See generally Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 608 (1989) (noting "the obvious safety hazards of drug and alcohol use by railroad employees" addressed by FRSA regulations). Under these regulations, "[e]xisting

procedural rights with respect to employment remain unabridged," specifically, "investigation, grievance and adjustment under the collective bargaining agreement and section 3 of the Railway Labor Act, 45 U.S.C. 153." *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47,102, 47,107 (Fed. R.R. Admin. Nov. 21, 1988).

This case arises out of GTW's employment of respondent James T. Roddy ("Roddy"). As a conductor, Roddy operates a freight train for GTW, typically in concert with only one other person, an engineer. A conductor is responsible for directing train movement to assure employee and public safety. This includes such "safety-sensitive tasks," *Skinner*, 489 U.S. at 620, as directing the engineer in the operation of the train, coupling and uncoupling cars to and from the train, and operating switches that determine the track to be occupied by the train.

The terms of Roddy's employment, i.e., his rate of pay, rules and working conditions, are governed by a CBA with Roddy's union, the United Transportation Union ("UTU"). Pursuant to the CBA, GTW has exercised the right to promulgate work rules relating to personal conduct and controlled substances, including investigatory procedures and disciplinary sanctions. Disputes involving the interpretation and application of those rules are subject to mandatory arbitration under the RLA.

On July 11, 2000, less than three hours before he was to begin a conductor shift, Roddy was arrested on, *inter alia*, misdemeanor charges of possessing the controlled substances methylphenidate and marijuana

and resisting arrest. After police subdued him with pepper spray, Roddy was detained and jailed overnight. Approximately one hour before his shift was to begin, his wife called GTW to report that he was "unavailable for work" that night. Compl. ¶ 15 (J.A. 13).[4] Roddy's absence on short notice resulted in the train's delay. (J.A. 75.)

GTW investigated Roddy's failure to report for his shift. During that investigation, GTW obtained a copy of Roddy's arrest record. In accordance with the provisions of the CBA between GTW and UTU, GTW held an investigational hearing into both Roddy's connection with illegal drugs and his short notice to GTW of his unavailability for work, in violation of GTW work rules. (J.A. 69-96, 149-50.) Roddy was represented by a union official, also in accordance with the CBA. Based on the resulting record (*see* J.A. 69-96), GTW suspended Roddy for sixty days and required that, before he could return to service, Roddy had to undergo an Employee Assistance Program ("EAP") evaluation, comply with any resulting recommendations, obtain a release from the EAP counselor to allow for GTW's verification, and undergo a company medical examination that included a drug test. (J.A. 128, 220.) At this time, the criminal drug charges were still pending against Roddy. (J.A. 153, 191-93.)

Roddy refused to undergo the required EAP evaluation and also failed to satisfy any of the other requirements for his return to service. GTW convened

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[4] References herein to "J.A. __" are to the Parties' Joint Appendix filed with the Sixth Circuit in this case.

another investigational hearing pursuant to the CBA and found that Roddy's noncompliance violated GTW work rules requiring employee compliance with department managers' instructions applying to their duties. (J.A. 97.) GTW dismissed Roddy for violation of those rules. Roddy unsuccessfully appealed his dismissal within the GTW disciplinary process. (J.A. 97, 221-23.)

Roddy exercised his rights under the CBA and the RLA to challenge the investigation, hearing, and dismissal in binding arbitration. He sought reinstatement, pay for all time lost (including payment for "all benefits, privileges and rights lost") and "expunging [of] all notation of investigation from [his] work record." Award No. 15, NMB, Pub. L. Bd. No. 6441, Docket No. 1000-2001—UTU files, 4465-R-GTW files (Aug. 26, 2003) (App. 42a-43a).[5] The arbitration panel determined that it had "jurisdiction of the parties, claim and subject matter," *id.* at 43a, and that Roddy "is guilty of the charges." *Id.* at 45a-46a. Because Roddy was "[a] long term employee with an otherwise good work record," however, it reduced the discipline from dismissal to "suspension from service for a period of three (3) months and [Roddy] will otherwise be made whole for wages, benefits and his seniority date." *Id.* at 45a-46a.

[5] The adjustment board's award is a matter of public record. A copy is included as App. E (App. 42a-46a).

iii. Course Of Proceedings And Disposition Below

Prior to the arbitration award, Roddy also filed a complaint against GTW and the other petitioners (GTW officials) in Michigan state court, which covered much of the same ground as his RLA arbitration. Like Roddy's arbitration demand, the complaint stated that it concerned the "terms, conditions, or privileges of [Roddy's] employment." Compl. ¶¶ 17, 30.

The complaint asserted that GTW had violated a Michigan statute that prohibits an employer from requesting, making, or retaining a record of an employee's misdemeanor arrest if that arrest did not result in a conviction, Mich. Comp. Laws § 37.2205a (the Michigan "Elliott-Larsen" statute). Roddy alleged that "[at] all material times, Plaintiff [Roddy] was an employee, and Defendant GTW was his employer," Compl. ¶ 23, and that "[a]s a result of the Defendants requesting, making or maintaining of a record or information of [Roddy's] misdemeanor arrest and detention, Defendant, GTW, conducted a formal company investigation on a charge of possession of marijuana which were [*sic*] alleged to be in connection to the terms, conditions, or privileges of Plaintiff's employment," *id.* ¶ 17; *see also id.* ¶ 30, and eventually "terminate[d] [Roddy's] employment," *id.* ¶ 27. Among other relief, the complaint sought compensatory and exemplary damages based on Roddy's alleged "lost wages" and job benefits *(id.*, Prayer ¶ 3), an injunction to prevent GTW from imposing further discipline based on Roddy's arrest (*id.*, Prayer ¶ 5), and other relief paralleling his RLA arbitration demands, e.g., reinstatement (*id.*, Prayer ¶ 6), and an order requiring

GTW to destroy the records of its disciplinary proceedings arising from Roddy's arrest (*id.*, Prayer ¶ 7).

Petitioners filed a timely notice of removal, stating that Roddy's "rights, if any, with regard to [his] claims in this case are governed and controlled by the mandatory provisions of the [RLA]" in that "any dispute regarding his rates of pay, hours, or conditions of employment are [*sic*] subject to the mandatory provisions of the [RLA]," and that the District Court "has original jurisdiction of plaintiff's complaint in this matter pursuant to 28 U.S.C. § 1331." (J.A. 8.) Roddy moved for remand to the state court. (J.A. 42-44.)

In a bench ruling, the district court denied the motion to remand. The court reasoned that "there are certain areas in which there is complete preemption, and certain aspects of the Federal Railway Labor Act are included in those." (App. 19a.) Further,

> the issues involved in the minor dispute here are areas exclusively reserved to the administrative scheme of the Railway Labor Act, including the character, fitness and safety of the personnel to operate the equipment involved. . . . [T]he safety, character and fitness of the employees to operate the trains is a matter which needs to be fully considered within the administrative scheme [of the RLA].

(*Id.* at 26a-27a.)

In a written opinion, the district court granted petitioners' subsequent motion for summary judgment, concluding that:

> [Roddy's] state law claims are inextricably intertwined with interpretation of rights and obligations that exist under the parties' CBA; *i.e.*, whether [GTW] has the right to request, make, or maintain a record of information regarding an off-duty misdemeanor drug arrest that did not result in a conviction and whether [Roddy] has a right to impede access to this information or to refuse to answer questions regarding such an arrest.

(App. 37a.) Further, Roddy's state law claims could not "be resolved independently of the CBA" and federal regulations, and were "in direct conflict" with GTW's rights and responsibilities thereunder. *Id.* The District Court also relied upon the holding in *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000), that "[u]nder the RLA, parties are obligated to arbitrate minor disputes, which are controversies arising out of the application or interpretation of the collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement." *Id.* at 949 (quoted at App. 34a-35a).

On Roddy's appeal from both orders, the Court of Appeals for the Sixth Circuit found a conflict in the other circuits as to whether the RLA has "the extraordinary preemptive force necessary to create federal removal jurisdiction," App. 12a; *see id.* at 7a-13a (discussing cases), i.e., whether federal courts have federal question jurisdiction over a claim pled under state law that involves interpretation or application of a CBA subject to the RLA, and hence constitutes a minor

dispute subject to mandatory arbitration under Section 3. The court of appeals acknowledged that "[t]he RLA gives the National Railroad Adjustment Board exclusive jurisdiction over disputes that arise out of collective bargaining agreements," but discerned "no indication that [in the RLA] Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment." *Id.* at 9a-10a (citations omitted). On that basis, it held that state law claims that constitute minor disputes under the RLA fall outside federal question jurisdiction. It therefore reversed the denial of Roddy's motion to remand, vacated the grant of summary judgment based only on its finding that the district court lacked jurisdiction, and returned the case to the district court with instructions to remand it to the state court. (App. 1a-14a.)[6]

GTW filed a timely petition for rehearing with a suggestion for rehearing *en banc*. On March 15, 2005, the Court of Appeals denied rehearing. (App. 47a-48a.)

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[6] The district court, in turn, remanded to the Michigan circuit court, where no action has been taken. It is well-settled that such remand does not "defeat this Court's jurisdiction" or affect this Court's "authority to review" the decision of the court of appeals. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947); *cf. Graddick v. Newman*, 453 U.S. 928, 945 n.* (1981) (Rehnquist, J.) (issuance of mandate or obedience to judgment does not bar review).

REASONS FOR GRANTING THE WRIT

The writ should be granted for three reasons:

1. The Sixth Circuit's decision places it on the minority side of a six-to-three circuit split on an important and recurring issue of federal law that likely will persist until resolved by this Court;

2. The Sixth Circuit's decision conflicts with decisions of this Court holding that (a) federal courts have federal question jurisdiction to enforce the RLA obligation to arbitrate minor disputes, and (b) Section 3 of the RLA has no less preemptive force than Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, under which state court actions asserting arbitrable grievances are subject to federal question jurisdiction; and

3. The Sixth Circuit's decision is contrary to Congress's intent to make the federal courts available to enforce the RLA dispute resolution process.

I. The Sixth Circuit's Decision Places It On The Minority Side Of A Six-To-Three Circuit Split On An Important And Recurring Issue of Federal Law.

The Sixth Circuit's decision widens a split among the courts of appeals. It directly conflicts with decisions of the United States Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, all of which have held that a state law cause of action that constitutes a minor dispute under the RLA "aris[es] under the . . . laws . . . of the United States."

28 U.S.C. § 1331. Two other courts of appeals, the Third and Eleventh Circuits, have preceded the Sixth Circuit in holding that RLA minor disputes do not implicate federal question jurisdiction when pled as state law causes of action.

In sum, nine circuits (plus numerous district courts[7]) have decided the issue, with six circuits determining the issue one way and three determining it the other. This circuit split undermines Congress's goal of uniformity and thereby also threatens the congressional goal of stability in rail and airline labor relations. Moreover, the uncertainty brought about by this circuit split is aggravated by the fact that the Nation's railroads and airlines face uncertainty as to the approaches to RLA matters that may be taken by the many state court judges in the ten states encompassed by the Third, Eleventh, and Sixth Circuits. This Court should grant certiorari in order to resolve this deep and long-standing conflict. *See* Sup. Ct. R. 10(a).[8]

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[7] For example, district courts in the First Circuit have also held, contrary to the decision below, that there is federal question jurisdiction over minor disputes pled as state law claims. *See, e.g., Burgos v. Exec. Air, Inc.*, 914 F. Supp. 792, 797 (D.P.R. 1996) ("removal from the Commonwealth court is appropriate, due to the RLA's complete preemption of state contract law in this matter"); *Sirois v. Bus. Express, Inc.*, 906 F. Supp. 722, 729 (D.N.H. 1995) ("[t]o deny removal under these circumstances would be to ignore Congressional intent" and "would jeopardize federal labor policies and encourage the proliferation of varying and inconsistent state court constructions of collective bargaining agreements"). The First Circuit itself has not addressed the issue.

[8] Other district courts have also recently noted the conflict among the courts of appeals. *See, e.g., Solimo v. Metro-North Commuter*

A. Six Circuits Hold That State Law Claims That Constitute Minor Disputes Under The Railway Labor Act Fall Within Federal Question Jurisdiction.

1. Seventh Circuit. In *Graf v. Elgin, Joliet & Eastern Railway*, 790 F.2d 1341 (7th Cir. 1986), the Seventh Circuit ruled that the RLA "so pervasively occupies the field of railroad labor disputes that a railroad worker's claim of wrongful discharge necessarily invokes federal law," *id.* at 1344, for which reason the claim comes within "federal-question jurisdiction under 28 U.S.C. § 1331," and "the district judge was authorized to decide whether Graf's claim of wrongful discharge is barred by the Railway Labor Act," *id.* at 1348. *See also Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987) ("'Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable [*sic*], the cases hold that that remedy is exclusive; the worker has no state remedies.'" (quoting *Graf*, 790 F.2d at 1346)).

2. Fourth Circuit. In *Arbogast v. CSX Corp.*, 831 F.2d 290 (unpublished table decision), *reported in full at* 1987 WL 38662 (4th Cir. 1987), the

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R.R., 253 F. Supp. 2d 733, 735 n.1 (S.D.N.Y. 2003); *Chille v. United Airlines*, 304 F. Supp. 2d 466, 469 (W.D.N.Y. 2004); *Mersmann v. Cont'l Airlines*, 335 F. Supp. 2d 544, 552 (D.N.J. 2004). The conflict has also been discussed in academic literature. *See, e.g.*, Eric J. Moss, *The Breadth of Complete Preemption*, 76 Va. L. Rev. 1601, 1618-25 (1990); 16 James Wm. Moore *et al.*, *Moore's Federal Practice* § 107.14[4][b][v][D], at nn.265.1-.3 (3d ed. 1997 & Supp. 2005).

Fourth Circuit followed *Graf* in holding that the RLA's "minor dispute provisions convert a state law claim into a federal claim for purposes of removal jurisdiction." 1987 WL 38662, at **1. It therefore held that an action seeking penalties under a West Virginia statute for failure to pay wages promptly was properly removed to, and dismissed by, the district court; the penalties sought were derived solely from the state statute, but the duty sought to be enforced – the duty to pay wages – was created by the RLA-governed CBA.

3. Eighth Circuit. The Eighth Circuit has held in both *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir. 1989), and *Gore*, 210 F.3d 944, that state law claims that constitute minor disputes are within federal question jurisdiction. It reasoned in *Deford* that the RLA "'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements." 867 F.2d at 1085 (citation omitted). The "RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from the collective bargaining agreement." *Id.*

4. Ninth Circuit. The Ninth Circuit has held that state law claims that constitute minor disputes "are completely preempted by the RLA," and thus cannot be remanded to state court. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990); *accord Beers v. S. Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983) (affirming removal because "the functioning of the labor relations process under the RLA is the heart of the Act and an area of federal concern"); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983) ("The application of this

statute and the necessity of its interpretation establish the existence of a federal question as an essential element of plaintiffs' cause of action, providing the basis for removal.").[9]

5. Fifth Circuit. The Fifth Circuit has stated that federal question jurisdiction supporting removal would exist if the state cause of action asserted in state court constituted a minor dispute under the RLA. *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 594 (5th Cir. 1993).[10]

6. Second Circuit. The Second Circuit has held that "[i]f the state claims put forward are in fact preempted by the RLA, the action may properly be removed to the federal courts, even when

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[9] The Sixth Circuit cited one Ninth Circuit case decided after *Schroeder* and *Beers* but before *Grote* to contend that "[t]he Ninth Circuit has also rejected a finding that a plaintiff's state law claims were completely preempted by the RLA." App. 10a. However, the pre-*Grote* case cited, *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), made no reference to any CBA or to Section 3 of the RLA, 45 U.S.C. § 153, but rather addressed preemption based only on the organization and collective bargaining provisions of Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. More recently, the Ninth Circuit has reviewed a district court's preemption analysis in a minor dispute case after the defendant "removed the action to federal court asserting federal question jurisdiction based on [*inter alia*] the RLA," without suggesting any retreat from its holding in *Grote* that there is federal question jurisdiction over state law claims that constitute minor disputes. *Espinal v. N.W. Airlines*, 90 F.3d 1452, 1455 (9th Cir. 1996).

[10] The Fifth Circuit held that the particular state claims asserted in *Anderson* did not constitute minor disputes and therefore were not removable.

the plaintiff's complaint does not itself include a federal cause of action." *Shafii v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir. 1996).[11]

B. Two Other Circuits Preceded The Sixth Circuit In Holding That State Law Claims That Constitute Minor Disputes Under The RLA Fall Outside Federal Question Jurisdiction

1. Third Circuit. In *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) ("*P&LE*"), the Third Circuit held that state law claims that constitute minor disputes are outside federal question jurisdiction. It reasoned that Congress had "fail[ed] to create in the RLA a civil enforcement action" in federal court, and that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiff's exclusive reliance on state law." *Id.* at 942-43.[12]

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[11] The Second Circuit held that the particular state claims asserted in *Shafii* did not constitute minor disputes and therefore were not removable. As a statement of the law in the Second Circuit, *Shafii* has been applied as the basis for removal of state law claims that do constitute minor disputes. *See Solimo*, 253 F. Supp. 2d at 735 & n.1 (holding such claims "ineligible for remand" because the Second Circuit "is clearly of the opinion that the RLA, like the Labor Management Relations Act ('LMRA') which it closely resembles, offers complete preemption and thus removal jurisdiction for artfully pled state law complaints in the RLA field").

[12] The Eighth Circuit in *Deford*, 867 F.2d at 1086, criticized *P&LE* as taking an "unnecessarily narrow" approach to the interpretation of congressional intent:

2. Eleventh Circuit. In *Geddes v. American Airlines, Inc.*, 321 F.3d 1349 (11th Cir. 2003), the Eleventh Circuit followed *P&LE* in denying federal question jurisdiction over state law claims that constitute minor disputes, because it could not discern any "indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from courts to the boards of adjustment." *Id.* at 1354. The Sixth Circuit relied heavily on *Geddes* in the opinion below. *See* App. 9a-13a.

C. This Deeply Entrenched Conflict Will Likely Persist Until Resolved By This Court.

The issue of federal jurisdiction over minor disputes pled as state law claims has been percolating for almost two decades, and each circuit's position (except that of the Seventh Circuit in *Graf*) was reached following a contrary decision by at least one other circuit. For example, the Third Circuit ruled against such federal question jurisdiction in *P&LE* in 1988, and the Eighth Circuit ruled in favor of it in

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> Not only must we look to affirmative congressional intent and civil enforcement provisions, but we must also look to such factors as the history and purpose of the statute. Recent case law illustrating the federal nature of the statute and analogous statutes with complete preemptive powers are also informative. Having analyzed the RLA under this light, we conclude that it was Congress' intent that the RLA govern all railway labor disputes such as those in this case arising from collective bargaining agreements.

Deford in 1989, in an opinion explicitly eschewing *P&LE's* "unnecessarily narrow" approach. 867 F.2d at 1086.

This Court's review is likely the only avenue for resolving the conflict. It is unlikely that all six circuits that have ruled in favor of federal question jurisdiction will reverse their position. Their positions are long-standing and, as discussed below, there are good reasons for believing that federal question jurisdiction is consistent with Congress's intent in the RLA and with this Court's RLA precedents.

There also is little reason to expect a reversal of the position of the three circuits that have ruled against federal question jurisdiction over state law claims that constitute minor disputes. Indeed, they likely will have no opportunity to do so. District courts following circuit precedent in these circuits will remand to state courts for lack of subject matter jurisdiction, and such remands are "not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d); *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995).

II. The Sixth Circuit's Decision Conflicts With Relevant Decisions Of This Court.

The Sixth Circuit's decision is inconsistent with this Court's decisions that have long and consistently recognized that, in enacting Section 3 of the RLA, Congress intended federal courts to have jurisdiction to compel compliance with its provisions. It also cannot be squared with this Court's precedents holding both that the preemptive force of Section 3 of the RLA is the same as (or greater than) that of Section 301 of the

Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that Section 301 of the LMRA has the preemptive force necessary to create federal question jurisdiction. These conflicts present independent reasons for this Court to review the Sixth Circuit's decision. Sup. Ct. R. 10(c).

A. This Court Has Held That Federal Courts Have Federal Question Jurisdiction To Enforce The RLA Obligation To Arbitrate Minor Disputes.

The Sixth Circuit's holding that "there is no indication that Congress intended federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment," App. 10a, conflicts with this Court's long-standing and consistent determination that "'the District Court has jurisdiction' . . . to enforce compliance with the requirements of [Section 3 of] the Railway Labor Act." *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 42 (1957) (quoting *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). For example, after surveying the RLA's legislative history and purpose, the Court in *Chicago River* unanimously recognized that Congress in the RLA intended that federal jurisdiction be available so that "federal courts can compel compliance with the provisions of the Act" regarding resolution of minor disputes by adjustment boards. 353 U.S. at 39. Likewise, in *California v. Taylor*, 353 U.S. 553 (1957), the Court ruled that federal question jurisdiction was available to plaintiff employees after the carrier members of an adjustment board (specifically, the First

Division of the NRAB) refused to arbitrate a minor dispute based on the erroneous belief that they lacked jurisdiction over the CBA at issue. It held that the employees were entitled to a federal court order compelling the arbitration of the minor dispute. *See also Consol. Rail Corp.*, 491 U.S. at 304 (noting federal court jurisdiction to "enjoin strikes arising out of minor disputes"); *cf. Pittsburgh & Lake Erie R.R. v. Ry. Labor Execs. Ass'n*, 491 U.S. 490, 513 (1989) (noting federal court jurisdiction to enjoin a union from striking "when the dispute concerns the interpretation or application of [an RLA-governed] contract and is therefore subject to compulsory arbitration," citing *Chicago River*).

The Sixth Circuit denied the existence of federal question jurisdiction to enforce Section 3 of the RLA based in part on its understanding that the RLA contains no legislative language "creating a federal cause of action for the resolution of [minor] disputes." App. 10a (citing *Geddes*, 321 F.3d at 1354).[13] However, Section 3 of the RLA does provide causes of action for federal district court enforcement and review of adjustment board awards. 45 U.S.C. § 153, First (p) & (q). Moreover, "[t]he absence of a specific statute conferring jurisdiction," as opposed to the general grant of federal question jurisdiction in 28 U.S.C. § 1331, is "of no moment" in RLA cases. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 690

[13] The Eleventh and Third Circuits employed similar reasoning. *See Geddes*, 321 F.3d at 1354 ("the statute includes no language granting general jurisdiction over minor disputes to federal courts"); *P&LE*, 858 F.2d at 942 (relying on "Congress' failure to create in the RLA a civil enforcement action" in federal court).

n.13 (1963) (citations omitted).[14] In *Central Airlines*, an airline employer refused to comply with an RLA arbitration award, and the affected employees brought a federal action to enforce the award. The lower courts found federal jurisdiction wanting because the RLA did not expressly create a federal cause of action to enforce airline (as opposed to railroad) arbitration awards. This Court unanimously reversed, following a long line of prior holdings that found "other duties imposed upon the carriers and their employees by the Railway Labor Act binding and their breach redressable in the federal courts, such as the duty to bargain, and the duty of a certified bargaining representative to represent all members of the craft without discrimination." *Id.* at 690 (citations omitted).

The Sixth Circuit's contrary approach conflicts with this Court's decisions recognizing federal question jurisdiction under 28 U.S.C. § 1331 to enforce Section 3 of the RLA without recourse to specific jurisdictional provisions. This conflict warrants this Court's review.

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[14] *Cf. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, No. 04-603, slip op. at 9 (June 13, 2005) ("[T]he absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810 (1986))).

B. This Court Has Held That Section 3 Of The RLA Has No Less Preemptive Force Than Section 301 Of The Labor-Management Relations Act, 29 U.S.C. § 185, Under Which State Court Actions Asserting Arbitrable Grievances Are Subject To Federal Question Jurisdiction.

The Sixth Circuit's conclusion "that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction," App. 12a, also is inconsistent with this Court's decisions. To the contrary, this Court's precedents hold that the preemptive force of Section 3 of the RLA is no less than that of Section 301 of the LMRA, and that Section 301 of the LMRA does have such preemptive force as to provide federal removal jurisdiction.

This Court has already settled the issue of federal removal jurisdiction under the LMRA, ruling that a "claim under [a] collective bargaining agreement [governed by the LMRA] is one arising under the 'laws of the United States.'" *Avco Corp. v. Aero Lodge No. 725, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968) (citation omitted). In *Avco*, this Court upheld the removal to federal court of an employer's state law claim for breach of a "no-strike" clause in a CBA, under which "grievances" were to be settled amicably or by binding arbitration. This Court held that Section 301 completely preempts state law causes of action to enforce such CBAs, replacing them with a federal cause of action to enforce the agreement. *Id.* at 559-61. This Court later elaborated upon *Avco* as follows:

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983) (footnote omitted).[15]

This Court's precedents establish that the "preemptive force" of Section 3 of the RLA is no less than that of Section 301 of the LMRA. Both statutes serve the same general goal of averting strikes and other labor disruptions by directing grievance disputes that cannot be resolved amicably to arbitration. *See*,

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[15] This Court has subsequently re-affirmed *Avco's* "'complete pre-emption' approach," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003), and applied it to support federal question jurisdiction over state common-law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), and over state common-law causes of action for usury against national banks, *Beneficial*.

e.g., *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-57 (1965) (LMRA); *Texas & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 564-67 (1930) (RLA). If anything, the federal interest underlying the RLA is stronger than that underlying the LMRA, since the LMRA merely enforces voluntary agreements to arbitrate, while the RLA compels such arbitration. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). Recognizing the similarities between the two statutes, and in consideration of the "desirability of having a uniform common law of labor law pre-emption," *Hawaiian Airlines*, 512 U.S. at 263 n.9, this Court has "adopt[ed]" the standard for preemption developed under the LMRA "to resolve claims of RLA pre-emption." *Id.* at 263. In keeping with the desirability of uniformity under the LMRA and the RLA, several of the courts of appeals that have upheld federal question jurisdiction over state law claims that constitute minor disputes have explicitly followed *Avco's* "complete preemption" approach. *See, e.g.*, *Gore*, 210 F.3d at 949; *Deford*, 867 F.2d at 1084-86; *Graf*, 790 F.2d at 1345-46. Their reasoning has been reinforced by this Court's recent re-affirmation of *Avco's* "'complete pre-emption' approach" in *Beneficial*, 539 U.S. at 7, where the Court confirmed the soundness of that approach and extended it beyond the LMRA and ERISA to another area of federal law.[16]

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[16] Indeed, one commentator has suggested that *Beneficial* undercuts the Eleventh Circuit's reasoning in *Geddes*, 321 F.3d 1349, for denying federal question jurisdiction under the RLA. *See* Note, *Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443, 1489 n.250 (2004).

If allowed to stand, the Sixth Circuit's contrary decision will bring about an anomalous result: under *Avco*, federal courts will be available to protect the *voluntary* labor arbitration process under the LMRA, but under *Roddy*, federal courts will not be available to protect the *mandatory* labor arbitration process that Congress required in the RLA. The Sixth Circuit defended this conclusion on the basis that "it would be difficult to find [the] extraordinary preemptive force [required for federal question jurisdiction under the "complete preemption" approach] when the Supreme Court has specifically rejected the contention that the RLA broadly preempts state-law claims based on discharge or discipline." App. 11a. That reasoning, however, ignores *Hawaiian Airlines*' "uniform common law of labor law pre-emption," 512 U.S. at 263 n.9, under which the breadth of Section 3 of the RLA's preemption of such state law claims is precisely the same as that of Section 301 of the LMRA, which, this Court held in *Avco*, has the required preemptive force.

The Sixth Circuit's decision conflicts with this Court's adoption of the "complete preemption" approach in *Avco* and a "uniform common law of labor law of pre-emption" in *Hawaiian Airlines*. This additional conflict also warrants this Court's review.

III. The Sixth Circuit's Decision Is Contrary To Congress's Intent to Make The Federal Courts Available To Enforce The RLA Dispute Resolution Process.

This Court has long recognized that the RLA is a federal "instrument of industry-wide government," which Congress created to preserve the autonomy and

integrity of the railroad industry as a "state within a state." *Taylor*, 353 U.S. at 565-66 (citation omitted); *accord, e.g., Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 541-45, 552-53 (1937). In enacting the RLA, Congress understood that federal protection of the autonomy of that system from state regulation was critically important to its goal: "the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.'" *Taylor*, 353 U.S. at 566 (quoting *United States v. California*, 297 U.S. 175, 186 (1936)).

The RLA preserves the autonomy of the federal arbitration system by preempting not only state laws, but also state law actions. As this Court recognized in *Hawaiian Airlines*, 512 U.S. at 253-59, a state law claim may proceed only if it presents a dispute that is not arbitrable because it involves rights that do not involve and are unaffected, or could not be affected, by the terms of a CBA.

The Sixth Circuit's decision curtails the availability of the federal courts to protect the autonomy of the RLA system by denying federal question jurisdiction over state law claims that constitute minor disputes. *See* App. 12a-13a. Under that holding, federal courts no longer are available (absent diversity or supplemental jurisdiction) to delineate the RLA's preemptive scope.

The Sixth Circuit's holding is contrary to Congress's intent. The text, structure, history and context of the RLA indicate that Congress considered it important to support the RLA arbitration system not only with federal law, but also with federal court

enforcement. Congress expressly provided that adjustment board orders are enforceable and reviewable "in the [appropriate] District Court of the United States." 45 U.S.C. § 153, First (p) & (q); *see, e.g., Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965). Moreover, as discussed above, this Court has consistently interpreted the RLA to create federal question jurisdiction to compel compliance with its arbitration system. *See supra*, Section II.A, and cases cited therein.[17]

By contrast, there is no support in the text of the RLA or in this Court's RLA precedents for the Sixth Circuit's implicit conclusion that Congress intended to create federal question jurisdiction to compel arbitrations, enforce and review arbitration awards, and enjoin strikes that would compromise the integrity of the arbitration system, yet did not intend to create federal question jurisdiction to protect the integrity of that federal system from overlapping state court actions.

The tension between the intent of Congress and the Sixth Circuit's opinion means that this Court's

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[17] The RLA's express and implied grants of federal question jurisdiction to compel and enforce arbitration distinguish it from the "anomal[ous]" jurisdictional scheme of the Federal Arbitration Act, 9 U.S.C. §§ 1-12, which "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). The Sixth Circuit's reasoning might be appropriate under that hybrid scheme, but it ignores the greater preemptive force of the more fully integrated and focused federal system created by the RLA.

review is also necessary to give the issue of federal question jurisdiction over minor disputes a coherent resolution that reflects the means and ends that Congress considered important in enacting the RLA and the proper role of the federal courts in safeguarding the RLA dispute resolution system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 13, 2005

APPENDIX A

(any footnotes trail end of each document)
No. 02-2499.

United States Court of Appeals,
Sixth Circuit.

James T. RODDY, Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD INCORPORATED; Tracy Miller; Lawrence T. Wizauer; David Cromie; Peter Brandon; Thomas Willett; Lawrence R. Martenis, Defendants-Appellees.

Argued: April 28, 2004.
Decided and Filed: Jan. 14, 2005.
Rehearing En Banc Denied March 15, 2005.

Douglas A. McKinney, Auburn Hills, Michigan, for Appellant.

Gregory A. Clifton, Durkin, McDonnell, Clifton, Davis & O'Donnell, Detroit, Michigan, for Appellees.

Before: MARTIN and ROGERS, Circuit Judges; BELL, Chief District Judge.*

BELL, Chief District Judge.

Plaintiff-Appellant James T. Roddy ("Roddy") appeals

the district court's denial of his motion to remand and the district court's subsequent grant of summary judgment in favor of the Defendants-Appellees, Grand Trunk Western Railroad, Inc., Tracy Miller, Lawrence T. Wizauer, David Cromie, Peter Brandon, Thomas Willett and Lawrence Martenis (collectively referred to as "Grand Trunk"). For the reasons that follow we reverse the denial of the motion to remand, vacate the entry of summary judgment, and remand to the district court with instructions to enter an order remanding the entire case to state court.

I.

Roddy alleged in his complaint that he began his employment for Grand Trunk in 1965 as a brakeman. In 2000 Roddy was employed by Grand Trunk as a conductor. On July 11, 2000, while driving a motor vehicle on personal business, Roddy was subjected to a routine traffic stop by the City of Durand, Michigan, Police Department. He was arrested and jailed on misdemeanor charges including possession of marijuana. Roddy's wife notified Grand Trunk that Roddy was unavailable for work on the night of July 11, 2000.

Roddy alleged in his complaint that the individual defendants, who are employees and/or agents of Grand Trunk, requested, made or maintained a record of information regarding Roddy's misdemeanor arrest or detention. Based upon those records Grand Trunk conducted a formal company investigation on a charge of possession of marijuana and ultimately terminated Roddy's employment. The misdemeanor charges that had been filed against Roddy on July 11, 2000, were eventually dismissed and no conviction resulted.

Roddy commenced this action in the Circuit Court for the County of Shiawassee, State of Michigan, alleging that Grand Trunk's conduct in requesting, making or maintaining a record of the misdemeanor arrest where a conviction did not result, and their conduct in threatening, coercing, and/or ordering Roddy to release information regarding the misdemeanor arrest or face further disciplinary action violated Roddy's rights under the Michigan Elliott Larsen Civil Rights Act, M.C.L. § 37.2205a.[1] The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief. Defendants removed the action to federal court on the basis of federal question jurisdiction. The district court denied Roddy's motion for remand and granted Defendants' motion for summary judgment. Roddy appealed both of these rulings.

II.

The district court denied Roddy's motion to remand based upon its determination that Roddy's claim under the Michigan Elliott Larsen Civil Rights Act was completely preempted by the Railway Labor Act, 45 U.S.C. § § 151-163, 181-188. We review the denial of a motion to remand *de novo*. *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir.1996). In conducting this review we look to the complaint at the time of removal and determine whether the action was properly removed in the first place. *Id.*

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing 28 U.S.C. § 1441(a)). "As a general rule, absent

diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).

Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether a complaint arises under federal law we apply the "well-pleaded complaint" rule. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir.2003). Under this rule "we examine the 'well pleaded' allegations of the complaint and ignore potential defenses." *Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392, 107 S.Ct. 2425. The well-pleaded complaint rule recognizes that the plaintiff is the master of his complaint. *Loftis*, 342 F.3d at 515. Accordingly, if the plaintiff chooses to bring a state law claim, that claim cannot generally be "recharacterized" as a federal claim for the purpose of removal. *Id.* (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). It is settled law that "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425 (emphasis in original). *See also Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058 ("[A] defense that relies on ... the pre-emptive effect of a federal statute will not provide a basis for removal."); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58,

63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.").

A state claim may be removed to federal court in only two circumstances--when Congress expressly so provides,[2] or "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat. Bank*, 539 U.S. at 8, 123 S.Ct. 2058. The "complete preemption" doctrine, developed in the case law, recognizes that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life*, 481 U.S. at 63-64, 107 S.Ct. 1542. Complete preemption applies where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425 (quoting *Metro. Life*, 481 U.S. at 65, 107 S.Ct. 1542). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425.

To date the Supreme Court has recognized complete preemption under only three statutes: § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and § 30 of the National Bank Act, 12 U.S.C. § §

85 & 86. *Beneficial Nat. Bank*, 539 U.S. at 6-7, 11, 123 S.Ct. 2058. As we noted in *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir.2004), it is the "unusually powerful pre-emptive force of § 301" that places it in the small category of statutes that not only preempt state law but also authorize removal of actions that sought relief only under state law. *Id.* at 723-24, (quoting *Beneficial Nat. Bank*, 539 U.S. at 7, 123 S.Ct. 2058). In those cases where the Supreme Court has found complete preemption, "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank*, 539 U.S. at 8, 123 S.Ct. 2058.

Complete preemption that supports removal and ordinary preemption are two distinct concepts. *Warner v. Ford Motor Co.* 46 F.3d 531, 535 (6th Cir.1995) (en banc). "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under [a federal statute] does not establish that they are removable to federal court." *Caterpillar*, 482 U.S. at 398, 107 S.Ct. 2425. Complete preemption that permits removal is reserved for statutes "designed to occupy the regulatory field with respect to a particular subject and to create a superseding cause of action" while ordinary preemption applies to statutory sections that arguably supersede conflicting state laws without creating the right of removal. 46 F.3d at 535. "[T]he congressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule." *Strong v.*

Telectronics Pacing Sys., Inc., 78 F.3d 256, 260 (6th Cir.1996) (citing *Warner*, 46 F.3d at 534-35).

In the absence of explicit direction from Congress, the Supreme Court has stated that it would be reluctant to find the extraordinary preemptive power that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *Metro. Life*, 481 U.S. at 64-65, 107 S.Ct. 1542.[3] As we recently noted:

> Complete preemption is a narrow exception to the well-pleaded complaint rule, whereby plaintiff is master of his complaint and can choose to assert only state law claims, in situations where Congress has indicated an intent to occupy the field so completely that any ostensibly state law claim is in fact a federal claim for purposes of arising-under jurisdiction.

AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir.2004). *See also Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 468 n. 11 (6th Cir.2002) ("Without evidence of Congress's intent to transfer jurisdiction to federal courts, there is no basis for invoking federal judicial power.").

> It is true that the doctrine of complete preemption goes beyond the usual contours of the well-pleaded complaint rule, in that it requires courts to attend to the underlying substance of a plaintiff's cause of action, and not merely whether it is denominated as arising from state or federal law. But, as the Supreme Court has instructed us, the complete preemption doctrine does not abrogate the federal courts' traditional focus on the complaint, in deciding questions of removal jurisdiction.

Alongi, 386 F.3d at 727.

The Supreme Court discussed the circumstances under which the RLA will preempt state law claims in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260-64, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). This discussion, however, only involved concepts of ordinary preemption and did not address the issue of complete preemption.

Grand Trunk has cited two Sixth Circuit cases in support of its contention that the RLA completely preempts Roddy's state law civil rights claim. In *McCall v. Chesapeake & Ohio R.R.*, 844 F.2d 294 (6th Cir.1988), we held that the plaintiff's state law Handicappers Civil Rights Act claim was preempted by the RLA. *Id.* at 303. *McCall* does not impact our present discussion. The plaintiff's claim in *McCall* was removed to federal court on diversity grounds and our preemption analysis involved ordinary preemption rather than complete preemption.

Grand Trunk has also cited *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir.1989). In *Beard* we noted in passing that the plaintiff's state law claims had not been removed "improvidently and without jurisdiction" to federal court. *Id.* at 121. Although this finding suggests that the RLA completely preempted plaintiff's state law claims, we did not engage in any discussion of the distinction between complete preemption and ordinary preemption and we did not analyze the RLA for Congressional intent. Most of our opinion in *Beard* was dedicated to the issue of ordinary preemption rather than complete preemption. It appears to this Court that to the extent we found complete preemption in *Beard*, that holding has been undermined by subsequent cases addressed above that

have discussed the prerequisites for a finding of complete preemption. *Accord, Tyree v. Burlington Northern and Santa Fe Ry. Co.*, 973 F.Supp. 786, 791 (W.D.Tenn.1997) (concluding that *Beard* is no longer good law).

In determining whether the RLA completely preempts Roddy's state civil rights claim we must begin by looking at the RLA itself. Congress passed the RLA "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines*, 512 U.S. at 252, 114 S.Ct. 2239. The framework provided by the RLA is a mandatory arbitral mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. The RLA gives the National Railroad Adjustment Board exclusive jurisdiction over disputes that arise out of collective bargaining agreements. *Beard*, 893 F.2d at 121-22. The existence of a mandatory arbitration provision, however, does not answer the question of whether Congress intended the RLA to occupy the field so completely that any "ostensibly state law claim" touching on railroad employment "is in fact a federal claim" for purposes of removal jurisdiction. *See AmSouth Bank*, 386 F.3d at 776.

The Eleventh Circuit examined the RLA in *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349 (11th Cir.2003). Based upon the language and substance of the RLA and its legislative history, the Eleventh Circuit concluded that the RLA did not have the extraordinary preemptive force necessary to create federal removal

jurisdiction. *Id.* at 1357. The court noted that in contrast to the LMRA and ERISA, the RLA does not create a federal cause of action for the resolution of disputes. *Id.* at 1354. Accordingly, federal courts are not in a position to fashion a cohesive body of federal law for enforcement of collective bargaining agreements under the RLA. *Id.* Moreover, there is no indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment. *Id.*

The Third Circuit similarly found "no evidence in the RLA or its legislative history of a Congressional intent to permit recharacterization and removal of what purports to be a state claim." *Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942 (3d Cir.1988). The Ninth Circuit has also rejected a finding that a plaintiff's state law claims were completely preempted by the RLA. *Price v. PSA Inc.*, 829 F.2d 871, 876 (9th Cir.1987). "Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is 'so powerful as to displace entirely any state cause of action.' " *Id.* (quoting *Metro. Life*, 481 U.S. at 64, 107 S.Ct. 1542).[4] *See also Tyree*, 973 F.Supp. at 792 (holding that removal was improper because "it is clear that the RLA does not satisfy the complete preemption doctrine because it does not create a parallel federal cause of action.").

Not all of the circuits are in agreement. The Eighth Circuit has held that "the RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from collective bargaining agreements." *Deford v. Soo Line R.R. Co.*,

867 F.2d 1080, 1085 (8th Cir.1989). More recently the Eighth Circuit held in *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir.2000), that the plaintiff's state law claims of false arrest, negligence, libel and slander, and invasion of privacy were completely preempted by the RLA and were removable to federal court because they were inextricably intertwined with the provisions of the labor contract. *Id.* at 950. *See also Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir.1993) (holding that employee's workers compensation retaliation claim was not completely preempted by RLA because claim did not require interpretation of the CBA).

On review we conclude that the Eleventh Circuit's analysis of the RLA in *Geddes*, 321 F.3d at 1353-57, is most consonant with the Supreme Court's instructions on how to approach issues of complete preemption. Complete preemption represents a substantial departure from the firmly established well-pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect. We agree with the Eleventh Circuit that Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court.

Indeed, it would be difficult to find such extraordinary preemptive force when the Supreme Court has specifically rejected the contention that the RLA broadly preempts state-law claims based on discharge or discipline:

> In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), the Court held that a state-law claim of wrongful termination

> was pre-empted, *not* because the RLA broadly pre-empts state-law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself.

Hawaiian Airlines, 512 U.S. at 257, 114 S.Ct. 2239 (emphasis in original). We conclude that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction.

Grand Trunk has suggested in the alternative that the district court's finding of complete preemption finds support in the Railroad Administration Regulations at 49 C.F.R. § 219.1 *et seq.* In *AmSouth* we rejected the contention that a federal regulation could completely preempt state law claims. We noted that although an agency has the ability to promulgate regulations with the force of federal law and therefore has the ability to preempt state causes of action through ordinary preemption, it does not have the ability to create a right of action where Congress has not intended it do so. 386 F.3d at 776-77. "While the agency can create federal law, it cannot expand federal jurisdiction." *Id.* at 777.

We conclude that there was no removal jurisdiction in this case and that the case should be remanded to state court. Because there is no removal jurisdiction, we do not have jurisdiction to reach the question of whether Roddy's state claim is in fact preempted by federal law. We agree with the Third and Eleventh Circuits that "[s]tate courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Geddes*, 321 F.3d at 1357 (quoting *Ry. Labor Execs. Ass'n*, 858 F.2d at 942). *See also Price*,

829 F.2d at 876 ("We express no opinion on the merits of PSA's federal preemption defense. We have confidence in the ability and willingness of state courts to enforce federal defenses.").

III.

For the foregoing reasons, the denial of plaintiff's motion to remand is **REVERSED**, the entry of summary judgment is **VACATED**, and the case is **REMANDED** with instructions to **REMAND** the entire action to the Shiawassee County Circuit Court for the State of Michigan for further proceedings.

Footnotes

* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

1.This statute provides in pertinent part:
An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result.
M.C.L. § 37.2205a.

2.As an example, the Supreme Court noted that the Price-Anderson Act contains an unusual preemption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out

of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. *Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058 (citing *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999)).

3.This reluctance was emphasized by Justice Brennan in his concurring opinion:

While I join the Court's opinion, I note that our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action ... *removable to federal court.*" *Ibid.* (emphasis added). In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court.
Metro. Life, 481 U.S. at 67-68, 107 S.Ct. 1542 (Brennan, J., concurring).

4.The Ninth Circuit has identified an apparent conflict within the circuit as to whether or not the RLA has complete preemptive power. *See Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 n. 4 (9th Cir.1993) (comparing *Price v. PSA Inc.*, 829 F.2d 871 (9th Cir.1987) with *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.1990) (citing *Price* with approval on a related issue, but then holding, without discussion, that the RLA does have complete preemptive power)).

APPENDIX B

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al.,
Defendant(s)

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

This matter came before the Court on Plaintiff's motion to remand. Being fully advised in the premises, having read the pleadings, and for the reasons stated on the record, the Court hereby orders as follows:
Plaintiff's motion to remand is denied.

s/Nancy G. Edmunds
U.S. District Judge

Dated: 04 OCT 2002

APPENDIX C

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al., Defendants

MOTION TO REMAND
BEFORE THE HONORABLE
NANCY G. EDMUNDS
United States District Judge
226 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
September 25, 2002

APPEARANCES:

MR. DOUGLAS A. MCKINNEY, ESQ.,

In behalf of Plaintiff.

MR. GREGORY A. CLIFTON, ESQ.,

In behalf of Defendant.

LAW CLERK: Court calls 02-72576, Roddy versus Grand Trunk Western Railroad. Counsel, please state your appearances for the record.

MR. MCKINNEY: Douglas McKinney on behalf of the plaintiff, James Roddy.

MR. CLIFTON: Good afternoon, Your Honor, Greg Clifton and Jerry McDonnell on behalf of defendant Grand Trunk.

THE COURT: It's plaintiff's motion to remand.

MR. MCKINNEY: Thank you, Your Honor. This matter was initially commenced in the Shiawasee Circuit Court in the State of Michigan. Matter was removed by a joint removal filed by the defendant. This motion to remand is based on the fact that my original complaint states no federal question and does not require the constitution of the United States statute, statute of the United States or a treaty of the United States to render jurisdiction. In this particular case, my claim rests entirely on the Elliott Larson Michigan Civil Rights Act and --

THE COURT: Well, it doesn't really depend on what you call it, though, does it? I mean, it depends on what underlying facts and law need to be resolved in order to effectuate the relief that you seek.

MR. MCKINNEY: Well, Your Honor, I have sat in my office and thought about this issue and whether or not this court had original jurisdiction of the case; in other words, could I have drafted any complaint in such a way as to grant subject matter jurisdiction in this court over

my complaint, and I have come up with no statute, no court rule that would allow me to bring this type of action in the federal court.

THE COURT: That's not dispositive either because I think that the response to that, anticipating Mr. Clifton and Mr. McConnell, is you may not have a cause of action right now because of the administrative regulatory scheme of the railroad act, National Railroad Act. I mean, I'm assuming that what will follow, if I keep this, is a motion to dismiss because it shouldn't be here in federal court. In fact, your client was proceeding through the grievance process under the RLA at the time that you decided to file this lawsuit.

MR. MCKINNEY: Well, Your Honor, I've discovered unlawful conduct prescribed by Michigan statute engaged in by the employer in this case, acts that are specifically prescribed by the Michigan statute. The Michigan statute does not -- my relief does not rely upon the collective bargaining agreement. The question is is there unlawful conduct engaged in by the employer.

THE COURT: What's the unlawful conduct?

MR. MCKINNEY: They requested, made, and maintained records of a misdemeanor arrest of the --- of my client that did not result in a conviction. Those are specifically outlined in the statute as being something the employer cannot do. Does not depend, the actions of the employer do not depend upon the collective bargaining agreement. Did they engage in this conduct? Did this conduct damage the plaintiff in this case? As such, it exists independent of the collective bargaining

agreement and is governed entirely by state law, conferring no jurisdiction over my case in this court. This is really a defense to a state law claim brought in the state court, not here.

THE COURT: Well, you're mixing black letter remand removal law with these preemption issues, and generally speaking, you're correct. If it's a defense based in federal law and the complaint is based exclusively in state law, the plaintiff has the right to put their complaint where they want to put it. But there are certain areas in which there is complete preemption, and certain aspects of the Federal Railway Labor Act are included in those, and there's that whole body of law about minor disputes and how to resolve minor disputes and all of those issues. So whether it's asserted as a defense and that would ordinarily be dispositive I don't think is really the issue in this case.

MR. MCKINNEY : Well, I'm not sure what the Court is trying to determine from my complaint, but I think if you look at Hawaiian Airlines versus Norris, it clearly indicates that if the state law claim exists independent of the collective bargaining agreement that it is not preempted.

THE COURT: Well, isn't the underlying question, you know, whether his discipline was appropriate or not, whether he violated the terms of the operating rules, and whether they had the right to impose discipline as a matter of the collective bargaining agreement under the operating rules? Maybe I got that reversed. But I mean, isn't this really a dispute involving a --- a minor dispute involving rights of pay, rules and working conditions?

MR. MCKINNEY: No, it involves unlawful conduct engaged in by the employer for which I'm entitled to a state remedy. They could be, in my view they could be completely consistent with the collective bargaining agreement yet violate state law, and state law gives me an alternate, not an alternate, an additional remedy over and above what other remedies he may have as set forth in the statute. The State of Michigan has decided that it's against public policy to allow employers to request, make or maintain arrest records for misdemeanors that do not result in a conviction. They engaged in that conduct. Whether or not they had any authority under the rules to do so, I suppose is another issue. However, this is direct, unlawful conduct prescribed by the State of Michigan which they have engaged in. Michigan law allows me other relief, specifically injunctive relief prohibiting the employer from continuing to engage in conduct that violates the Act, which I have requested in the complaint. I want injunctive relief, as well.

So there's no way to get injunctive relief under the Railway Labor Act to prohibit their unlawful conduct. This is precisely the reason the legislature enacted, Michigan enacted this law, to give additional remedies and describe unlawful conduct. I don't see anything in the Railway Labor Act or the rules and regulations which say that a carrier and a union can somehow agree to violate state law. It seems to me such a contract would be void as against public policy, and in this particular instance, if we look directly at my case and I believe based on their filings here, they basically admitted that they violated in part the act; I would be entitled to summary disposition, as well, because they violated the act.

There is another claim of improper action by the employer, specifically, making him or requiring him to, or forcing him not to exercise the rights guaranteed to him under the Michigan Elliott Larson Civil Rights Act. Specifically, not to have to make mention of his misdemeanor arrest while it's pending, and didn't result in a conviction. This is what happened. After the initial discipline was imposed, he was required to go to a treatment program which he appeared at, but in order to enter the program, they required him to admit wrongdoing, admit that he violated the law, and then sign a release allowing that information to be disseminated presumably to the prosecutor who is presenting the case. This is the purpose of the statute, not to allow them to coerce him to give up rights that he otherwise would have in the criminal action.

And I will state that the underlying charges were dismissed with prejudice in the case. There was never a conviction for either the possession of the drugs or for resisting, obstructing a police officer. In short, what they've done is, they've used the police report that they're not supposed to have access to then put him in disciplinary action, and then force, try to force him to, quote unquote, confess, and that's what the statute is trying to avoid. It's trying to avoid putting an employee in such a position where the employer can hold over his head his continued employment unless he confesses, which is precisely what they're trying to avoid by enacting the statute.

THE COURT: All right. Let me hear from Mr. Clifton.

MR. CLIFTON: Good afternoon, Your Honor.

I think, with due respect to Mr. McKinney, he is missing the point that the court was trying to make which is, assuming for the moment that there is some basis for a Elliott Larson claim in this case, which we deny based on the circumstances, but even if, assuming it was, the point of the matter is the Railroad Labor Act supersedes any such potential claim and mandates that under this type of circumstance, a plaintiff's sole remedy is to proceed through the exclusive procedures of the-- of that act and the National Adjustment Board.

And particularly given the facts in this case where you have an individual who was arrested on July 11, 2000 for possession of marijuana, whose violent behavior at the time of that arrest resulted in him also being charged with resisting arrest, and whose willingness to lie to his employer about the circumstances of it because he was scheduled to work that night, certainly, all of those types of issues, those facts, concern Mr. Roddy's physical ability to do his job, the physical requirements of his job, and because of that, Grand Trunk was certainly entitled under the collective bargaining agreement between Mr. Roddy and his union to commence a labor hearing to look into these facts as to how they affect Mr. Roddy's ability to perform his work. Then, as part of that, assess his violation of very specific work rules, as pointed out by the Court, that says you can't do this type of thing.

THE COURT: Well, but how do you square that with the very explicit prohibition in the civil rights act? I mean, it seems to me that this is somewhat different from the usual preemption case that we get in that the allegation is, okay, he's arrested, charged with a misdemeanor which ultimately is dismissed.

MR. CLIFTON: As part of a plea agreement, I might add.

THE COURT: Well, regardless, it doesn't matter whether it's part of a plea agreement or anything else. There's no conviction in this case.

MR. CLIFTON: That's well understood, Your Honor.

THE COURT: And Grand Trunk is taking that conviction -- I mean that arrest and using it to impact his employment in what looks to me to be a square contradiction of MCL 37.2205(a) which says an employer shall not, in connection with an application, et cetera, or in connection with the terms, conditions or privileges of employment request, make or maintain a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.

So how -- I mean, the statute is, seems to me, pretty clear, and I'm --

MR. CLIFTON: May I address that, Your Honor?

THE COURT: You may.

MR. CLIFTON: First of all, I guess it's not for today, but it's worth mentioning, I suppose, that the Michigan Court of Appeals has ruled, and the Sixth Circuit has adopted that ruling that this particular civil rights act and the provision regarding arrest records only applies to prospective employers, not current employers such as Grand Trunk, but that aside for the moment, I guess the central issue here is why was Mr. Roddy disciplined

on July 26 following his arrest on July 11? It was not because there was an arrest record, because as the, I think it's the Quatrine(ph) case pointed out, it would be folly to suggest that Grand Trunk could go to the police station and get this information and come back and then conduct a disciplinary hearing, and that would be permissible, but the mere fact that they obtained a copy of the arrest record, that somehow makes it inappropriate.

The reason he was disciplined initially was not because of the existence of an arrest record. The reason he was disciplined was because, as I indicated, he had in his possession marijuana when he was scheduled to work that night on a train crew that could be taking trains from point A to point B and cause catastrophic damages.

THE COURT: And how do you know that?

MR. CLIFTON: Because he was scheduled to work -- one of the charges against him was when he was scheduled to work that night, he had his wife call in and falsify a report regarding why he couldn't come into work that night.

THE COURT: So how does it come up that he had marijuana in his possession?

MR. CLIFTON: Well, again, when it came to the railroad's attention that this individual was perhaps not being forthright in why he did not come to work that particular evening.

THE COURT: And how did that come to its attention?

MR. CLIFTON: Well, I think a co-employee of Mr. Roddy, frankly, advised somebody in supervision that I think you should look into this, you might find out that he's not telling the truth, and then they conducted an investigation which, by the way, and I haven't had a chance to get to it yet, as a separate basis for exclusively RLA jurisdiction, the railroad was essentially mandated by provisions of 49 CFR 219 to conduct this exact type of investigation. Those provisions set forth some rather strict and severe procedures for what a railroad is supposed to do when they learn that an employee may be involved in some type of drug or alcohol use, and that's all that the railroad did here was conduct an investigation, and when they concluded that, yes, this individual did violate these work rules as a result of his conduct, he was disciplined for that.

His arrest record had nothing to do with it, frankly, and if you look at the transcript of the hearing, it was rather incidental to the entire proceeding.

THE COURT: All right. Let me have a brief reply from plaintiff's counsel.

MR. MCKINNEY: I didn't see a citation of the statute he just indicated or the CFR that he just talked about, however, I don't see how you could read the transcript of that proceeding and not come to the conclusion that based entirely upon the unlawfully obtained arrest record he was disciplined. Based on that record alone, they made a finding that he was in possession of marijuana and disciplined him as a result of that. There was no other evidence on that record that he possessed an illegal substance. So for them to now say, well, it was

incidental, it wasn't incidental. It was the major reason they ordered him to go to drug rehabilitation. There was no admissions made on the record as to that issue.

Now, I don't see how, unless there's an express intent of congress to preempt, have the Railway Labor Act preempt state civil rights statute like this that they can infer that it exists. In other words, what they're trying to say here is that because of the Railway Labor Act and because of a contract, we can disregard state law, and Hawaiian Airlines says that's not the case, and in fact it's not preempted if it involves an independent state right not negotiated in the contract.

THE COURT: All right. Thank you.

I'm going to deny the motion to remand. I think Mr. McKinney actually kind of hit it on the head right at the end. I don't believe that the state civil rights claim is independent of the Railway Labor Act. In fact, the issues involved in the minor dispute here are areas exclusively reserved to the administrative scheme of the Railway Labor Act, including the character fitness and safety of the personnel to operate the equipment involved, and to the extent that there is a conflicting civil rights statute, and I'm not foreclosing the possibility of some relief under the civil rights statute, it still has to be reconciled with the administration of the Railway Labor Act.

Obviously, the safety, character and fitness of the employees to operate the trains is a matter which needs to be to be fully considered within the administrative scheme, taking into account any laws that may be impacted. So motion to remand denied.

MR. MCKINNEY: Are you suggesting that I can get injunctive relief from this court on my cause of action?

THE COURT: I'm not suggesting that you can or can't get anything. I'm just ruling on your motion to remand. Thank you.

MR. MCKINNEY: Is the court going to prepare an order, or should I?

THE COURT: My order will simply state for the reasons stated on the record, but we'll prepare it.

MR. CLIFTON: Thank you, Your Honor.

APPENDIX D

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al., Defendants

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Honorable Nancy G. Edmunds
Clerk's Office U.S. District Court Eastern Michigan

Filed: 11/21/2002

This matter comes before the Court on Defendants' motion for summary judgment brought pursuant to Fed. R. Civ. P. 12(c) and 56(c). Defendants' motion is GRANTED. For the reasons stated below, this Court lacks subject matter jurisdiction over Plaintiff James T. Roddy's state law claims. Plaintiff's complaint is dismissed.

I. Facts

Plaintiff began his employment with Defendant Grand Trunk in 1965 as a brakeman. In July 2002, Plaintiff was employed at Grand Trunk as a conductor. (Compl. Pars.

11, 20.) He was a member of the United Transportation Union, and the terms of his employment were subject to a collective bargaining agreement ("CBA"). (Defs. motion, Ex. B, Kovacs Aff. Par. 5.)

The events giving rise to Plaintiff's lawsuit occurred on July 11, 2000. At approximately 8:05 p.m. while Plaintiff was off-duty, he was arrested by the City of Durand Police Department for, *inter alia*, possession of marijuana and resisting arrest (both misdemeanors). Plaintiff alleges that during his arrest, he was exposed to chemical irritants (pepper spray) and jailed. (Compl. Par. 14.) Plaintiff was scheduled to report for duty at 10:45 p.m. (Defs. motion, Ex. C, 7/26/00 Hr'g Tr. at 6.) Plaintiff's wife called Defendant Grand Truck at approximately 9:40 p.m. indicating that he was sick and would not be reporting for his scheduled work. (*Id.*; Compl. Par. 15.) Plaintiff was released on bond at approximately 4:30 p.m. on July 12, 2000. (Defs. motion, Ex. C, 7/26/00 Hr'g Tr. at 22.) Plaintiff alleges that the charges arising out of the events of July 11, 2000 were dismissed and no conviction resulted. (Compl. Par. 25.)

Representatives of Defendant Grand Trunk learned about the above events and an investigation by Grand Trunk Manager David Cromie confirmed Plaintiff's possession of marijuana and other unlabeled drugs as well as his resisting arrest charge. Defendant Grand Trunk obtained a copy of the Durand Police Report regarding the July 11, 2000 incident and a State of Michigan Drug Test Report. (Defs. motion, Ex. A.) Based on this information, Grand Trunk held an investigative hearing on July 26, 2000 to determine Plaintiff's responsibility for: (1) "alleged conduct unbecoming an employee by being arrested for

possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2"; and (2) "allegedly having [Mrs. Roddy] book [Plaintiff] sick as a subterfuge to avoid duty at 2140 hours on July 11, 2000." (Defs. motion, Ex. C, at 1.) Grand Trunk Operating Rule E provides that:

> Employees must be courteous, orderly, of good moral character, and must conduct themselves at all times whether on or off of company property in such a manner as not to bring discredit upon the company. Card playing, gambling, making bets, fighting or participating in any illegal, immoral, or unauthorized activity while on company time is prohibited.

Defs. Br. at 4-5 (emphasis added). The July 26, 2000 hearing was conducted in accordance with the provisions of the CBA between Grand Trunk and the United Transportation Union (Plaintiff's Union). (Defs. motion, Ex. B, Kovacs Aff. Par. 16, Senior Manager of Labor Relations for Grand Trunk.). Plaintiff was represented at the hearing by his Union.

On August 4, 2000, consistent with the CBA, Plaintiff was assessed the following discipline:

> Sixty (60) Day Suspension
>
> For conduct unbecoming an employee by being arrested for possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2 and having your wife book you sick as a subterfuge to avoid duty at 2140 hours on July 11, 2000.

> In addition, you must undergo an EAP evaluation and fully comply with any recommendation developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service.

Defs. motion, Ex. D, 8/25/00 letter to Plaintiff. Plaintiff was scheduled to attend an Employee Assistance Program (EAP) evaluation with Insight Clinic on September 8, 2000.

Plaintiff failed to provide evidence that he had completed the EAP evaluation/counseling and other requirements of his discipline. Accordingly, a second investigative hearing was held, pursuant to the CBA, on November 6, 2000 to determine Plaintiff's responsibility "for violation of Canadian National Illinois Central Operating Rule 'B'" which provides that employees are to comply with instructions from supervisors. (Defs. motion, Ex. E, 11/6/00 Hr'g Tr. at 1; Ex. F, 1/19/01 letter to Union at 1-2.) Plaintiff was also represented at this hearing by his Union. Plaintiff was found guilty of violating Operating Rule "B", and on November 25, 2000, he was dismissed from employment with Defendant Grand Trunk. (Defs. motion, Ex. F, 1/19/01 letter at 2.)

The Union, on Plaintiff's behalf, filed a first level appeal of his dismissal. This proved unsuccessful. (Defs. motion, Ex. F, 1/19/01 letter at 2-3.) Consistent with the CBA, Plaintiff is entitled to further pursue his dismissal through an appeal to the carrier's senior manager of labor relations. He also has the right to ultimately appeal his dismissal to binding arbitration before a

panel of the National Railroad Adjustment Board in accordance with provisions of the Railway Labor Act, 45 U.S. C. §§ 151, *et seq*. Plaintiff asserts that he is following this procedure. (Pl.'s Resp. at 10.)

In addition to pursuing internal appeal procedures for his discipline and discharge, Plaintiff also filed a civil action in the Circuit Court for the County of Shiawassee in June of 2002. Plaintiff's complaint alleges that Defendants wrongfully terminated him in violation of his rights, pursuant to Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Annot. § 37.2205a, not to be discriminated against for an off-duty misdemeanor drug arrest that did not result in a conviction. Plaintiff seeks both legal and equitable remedies; i.e., compensatory and exemplary damages, an order enjoining Defendants from discriminating or retaliating against him, requiring Defendants to remove and destroy all documents mentioning the disciplinary action described above, and requiring Defendants to reinstate Plaintiff to the position he would have held absent the alleged discrimination, (Compl. at 7.)

Defendants removed this action in July 2002, and this Court denied Plaintiff's motion to remand on October 4, 2002.

II. Standard of Review

A. Judgment on the Pleadings

At any time after the pleadings close, but before trial commences, a party may move for a judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). The standard of

review is the same as on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

As with a 12(b)(6) motion, in a light most favorable to Plaintiff, the court must assume that Plaintiff's factual allegations are true and determine whether the Complaint states a valid claim for relief. *See Albright v. Oliver*, 510 U.S. 266 (1994); *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996); *Forest v. United States Postal Serv.*, 97 F.3d 137, 139 (6th Cir. 1996).

This standard of review "'requires more than the bare assertion of legal conclusions.'" *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (quoting *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)). The Complaint must include direct or indirect allegations "respecting all the material elements to sustain a recovery under some viable legal theory." *See In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citations omitted). A court should not grant such a motion unless the movant shows "beyond doubt that the plaintiff can prove no set of facts in support of his claim," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52

(1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. Analysis

The essence of Plaintiff's complaint is that he was wrongfully discharged because Michigan law precludes his employer from disciplining him based on an off-duty misdemeanor drug arrest that did not result in a conviction. *See* Mich. Comp. Laws § 37.2205a (West 2001).[1] Defendants bring this motion asserting that this action should be dismissed because Plaintiff's state-law claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, and this Court lacks subject matter jurisdiction over them.

"Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 248, 252 (1994). Congress passed the RLA to promote stability in labor-management relations for the railway industry "by providing a comprehensive framework for resolving labor disputes." *Id.* (citing 45 U.S.C. § 151a). Defendants' preemption argument is premised on the assertion that Plaintiff's state-law claims are "minor disputes" within the meaning of the RLA and are therefore subject to arbitration under the RLA's exclusive jurisdiction provisions. "Under the RLA, parties are obligated to arbitrate minor disputes, which are controversies arising out of the application or interpretation of the

collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement." *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000), *cert denied*, 532 U.S. 921 (2001).

The RLA defines "minor disputes" as those that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. Preemption under the RLA is governed by the same standard as that applied under § 301 of the Labor and Management Relations Act, 29 U.S.C. § 185. *See id.* "[U]nder this standard 'a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the [collective bargaining agreement].'" *Id.* (quoting *Hawaiian Airlines*, 512 U.S. at 260). Stated otherwise, as long as the state-law claim can be resolved without interpreting the parties' rights and obligations under the CBA, then the claim is independent for preemption purposes. *See Hawaiian Airlines*, 512 U.S. at 262, As observed by the Supreme Court, "collective bargaining agreements may include implied, as well as express, terms" and that "the parties' 'practice, usage and custom' is of significance in interpreting their agreement." *Consolidated Rail Corp. v. Railway Labor Executives' Assn*, 491 U.S. 299, 311 (1989). *See also Hawaiian Airlines*, 512 U.S. at 265 n.10 (citing *Consolidated Rail*, 491 U.S. at 311-12; *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-79 (1960)). "The collective agreement covers the whole employment relationship." *Consolidated Rail*, 419 U.S. at 312 (internal quotes and citations omitted).

It is not disputed here that Defendant Grand Trunk has implemented the Federal Railroad Administration regulations governing alcohol and drug use by railroad employees. *See* 49 C.F.R. § 219.1, et seq. "Pursuant to congressional authorization and in response to evidence implicating substance abuse in railroad accidents, the Federal Railroad Administration in 1985 promulgated a comprehensive set of detailed regulations concerning the use of alcohol and drugs by railroad employees." *Union Pacific Railroad Co. v. United Transportation Union*, 3 F.3d 255, 261 (8th Cir. 1993) (citing 50 Fed. Reg. 31508 (1985) (codified as amended at 49 C.F.R. Part 219)). These federal regulations set forth the parties' rights and obligations when addressing issues concerning a railroad employee's alcohol or drug use. Their general purpose is "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" and to prescribe "minimum Federal safety standards for control of alcohol and drug use" while not "restrict[ing] a railroad from adopting and enforcing additional or more stringent requirements not inconsistent" with these regulations. 49 C.F.R. § 219.1.

Defendants assert that Plaintiff's state-law claims would require interpretation of the parties' rights and obligations under their CBA; i.e., Operating Rule E and these federal regulations promulgated by the Federal Railroad Administration. *See* 49 C.F.R. §§ 219.1, 219.13, 219.101, and 219.102. Defendants argue that Operating Rule E and 49 C.F.R. § 219.102 govern off-duty drug use and that Plaintiff's state-law claims directly conflict with the duties imposed on them under 49 C.F.R. § 219.105. Accordingly, they argue, Plaintiff's state-law claims are preempted as "minor disputes" by the "RLA",

45 U.S.C. § 151a, are subject to its exclusive adjudicative procedures, and thus Plaintiff's claims must be dismissed as this Court lacks subject matter jurisdiction over them. This Court agrees with Defendants.

Plaintiff's state-law claims are inextricably intertwined with interpretation of rights and obligations that exist under the parties' CBA; i.e., whether Defendant Grand Trunk has the right to request, make, or maintain a record of information regarding an off-duty misdemeanor drug arrest that did not result in a conviction and whether Plaintiff has a right to impede access to this information or to refuse to answer questions regarding such an arrest. Defendants assert that Operating Rule E allows it to investigate whether Plaintiff conducted himself in a manner that does not discredit the company even when he is off-duty. They further assert that 49 C.F.R. § 219.102 prohibits railroad employees from using controlled substances like marijuana "at any time, whether on duty or off duty" and that 49 C.F.R. § 219.105 imposes a duty on a railroad employer to "exercise due diligence to assure compliance with . . . § 219.102 by each covered employee" and Plaintiff is a covered employee. Plaintiff disagrees.

Plaintiff's argument, that his state-law claims brought pursuant to Michigan's Elliott- Larsen Civil Rights Act, § 37.2205a involve rights and obligations that exist independent of the parties' CBA, is overly simplistic. Plaintiff fails to address, as he must, whether his state-law claims can be resolved independently of the CBA, Operating Rule E, and the above-referenced federal regulations. They cannot. In fact, Plaintiff's state-law

claims are in direct conflict with Defendants' responsibilities under these federal regulations. Pursuant to § 219.105, Defendants have a duty to investigate and assure compliance with § 219.102's prohibition against off-duty use of a controlled substance. This is a broad requirement that does not distinguish between misdemeanor drug violations and felonies or between arrests leading to convictions and those that do not. A railroad employer cannot comply with these federal regulations and Mich. Comp. Laws § 37.2205a when the off-duty drug activity involves a misdemeanor arrest, detention, or disposition not resulting in a conviction.

Plaintiff's state-law claims, that he was wrongfully disciplined and discharged based on consideration of his off-duty misdemeanor drug arrest, cannot be understood without reference to the CBA, Operating Rule E, and the above-referenced federal regulations. To prove his claim, Plaintiff must prove that Defendants did not have the right, under the express or implied terms of the CBA governing their working relationship, to investigate and consider evidence of employee drug use under the circumstances presented here. The instant case is fundamentally a labor dispute and is properly defined as a "minor dispute" within the meaning of the RLA, 45 U.S.C. § 151 a. Accordingly, Plaintiff's state-law claims are preempted and subject to dismissal for lack of subject matter jurisdiction because the RLA sets forth the exclusive mechanism for resolution of minor disputes.[2]

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED, and Plaintiff's complaint is dismissed.

s/Nancy G. Edmunds
U. S. District Judge

Dated: 21 Nov 2002

Footnotes

FN1. Mich. Comp. Laws Annot. § 37.2205a provides that:

> (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal.

FN2. In light of the above, there is no need to address Defendants' additional dismissal arguments; i.e., (1) that Michigan's Civil Rights Act provides solely for

employer liability, not individual employee liability; and (2) that the Act applies only to prospective rather than current employers.

No. 02- 72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al. Defendants

JUDGMENT

The Court having reviewed the pleadings in this matter and being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion for summary judgment is hereby GRANTED, and the case is DISMISSED.

So ORDERED.

Nancy G. Edmunds
U. S. District Judge

Dated: 21 Nov 2002

APPENDIX E

Award No. 15

National Mediation Board
Public Law Board

No. 6441

Canadian National Railway

And

United Transportation Union (GTW)
Grand Trunk Western Railway

Docket No. 1000-2001-UTU files
4465-R-GTW files

Case No. 15

Claimant: J.T. Roddy

For the Organization: Bruce Wigert, Vice President, UTU

For the Carrier: Sean McFarlin, CN-Manager Human Relations

Neutral: Dr. James R. McDonnell

STATEMENT OF CLAIM

Claim of Trainman, J.T. Roddy, for reinstatement to service with seniority rights unimpaired, with payment

of all time lost as a result of investigation held November 6, 2000, for alleged violation of Canadian National/Illinois U.S. Operating Rule "B" REPORTING AND COMPLYING WITH INSTRUCTIONS. Pay for all time lost including payment for all benefits, privileges and rights lost and expunging all notation of investigation from work record.

FINDINGS OF THE BOARD

The Board, upon the whole record an all evidence finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended ("RLA"); that the Board is duly constituted by agreement, and has jurisdiction of the parties, claim and subject matter which was held on July 18, 2003 in Troy, Michigan. The Board makes the following additional findings.

DECISION

The Claimant has been an employee of the Carrier for 32 years prior to November 6, 2000. At that time he worked as a conductor.

On August 25, 2000, the Carrier sent a letter to the Claimant, which said, in part:

> #395 – Sixty (60) Day Suspension
> For conduct unbecoming an employee by being arrested for possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2 and having your wife book you sick as a subterfuge to avoid

duty at 2140 hours on July 11, 2000.

In addition, you must undergo an EAP evaluation and fully comply with any recommendation developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service.

On October 13, 2000, the Carrier sent a letter to the Claimant, which said, in part:

Peter Brandon, Manager of Medical Services has informed me that you have failed to comply with the terms of your discipline assessed on August 4, 2000, which states as follows:

"In addition, you must undergo an EAP evaluation and fully comply with any recommendations developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service."

Per your conversation with Mr. Brandon on Thursday, October 12, 2000 at approximately 1:20 p.m., you were further informed that you MUST undergo the EAP Assessment and provide Mr. Brandon with a written report and any recommendations from the counselors. This information MUST be forwarded to Mr. Brandon no later than Monday, October 23, 2000. Failure to comply with the above instructions may result in further disciplinary actions.

The Claimant failed to comply with the letters and directives sent to him by the Carrier.

A formal investigation was held on November 6, 2000 and on November 28, 2000. Carrier issued a Notice of Discipline informing the Claimant that he had been dismissed from service.

The Carrier has carried its required burden of proof in the instant claim. The Claimant failed to comply with the requirements related to the EAP counselor procedures.

The Board, however, believes that the decision by the Carrier to dismiss the claimant from services is excessive. It seems that there are mitigating circumstances which must be taken into account.

At the time of the Claimant's arrest for charges noted above, the Claimant had a confrontation with a police officer. Claimant hired legal counsel who advised him that he should not sign a release from EAP and he did not.

Claimant was later cleared of the charges. But, advice of counsel kept him from completing the EAP requirements in a timely fashion. Thus, the Claimant caught between these two forces found himself in a dilemma.

A long term employee with an otherwise good work record will be given reasonable consideration by this Board.

The Board, therefore, concludes that the Claimant is

guilty of the charges, and will have a suspension from service for a period of three (3) months and will otherwise be made whole for wages, benefits and his seniority date.

AWARD

Claim sustained in accordance with the Decision.

ORDER

This Board hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmarked date the Award is transmitted to the parties.

Bruce Wigert, Vice President, UTU

Sean McFarlin, CN – Manager, LR

s/Dr. James R. McDonnell, Neutral

August 26, 2003
Date

APPENDIX F

No. 02-2499.

United States Court of Appeals
for the Sixth Circuit.

James T. RODDY, Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD INCORPORATED, ET AL.

Filed: March 15, 2005

ORDER

BEFORE: MARTIN and ROGERS, Circuit Judges; and BELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green, Clerk

Footnote
*Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

APPENDIX G

STATUTORY APPENDIX

1. Section 1331 of Title 28 of the United States Code, titled "Federal question," provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. Section 1441 of Title 28 of the United States Code, titled "Actions removable generally," provides as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a

citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district

court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for

the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

3. Section 151 of Title 45 of the United States Code, titled "Definitions; short title," provides as follows:

When used in this chapter and for the purposes of this chapter--

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49, as of December 31, 1995, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term

"carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District

of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or

corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

4. Section 151(a) of Title 45 of the United States Code, titled "General purposes," provides as follows:

The purposes of the chapter are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;
(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

> (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

5. Section 153 of Title 45 of the United States Code, entitled "National Railroad Adjustment Board," provides as follows:

> **First.** Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.
>
> There is established a Board, to be known as the "National Railroad Adjustment Board", the members of ~~which~~ shall be selected within thirty days after June 21, 1934, and it is provided—
>
> > (a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.
> >
> > (b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or

trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to

the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise

designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as

the number of their members shall be as follows:

> First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in

the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have

jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person,

by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact

to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to

make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and

such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the

division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain

headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as

vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to

act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and ~~enforcement~~ of awards.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier

or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon

an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

MOTION FILED

AUG 19 2005

No. 05-106

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INC., *et al.*,
Petitioners,

v.

JAMES T. RODDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* AIRLINE INDUSTRIAL RELATIONS CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND NATIONAL RAILWAY LABOR CONFERENCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Airline Industrial Relations Conference ("AIRCON"), the Association of American Railroads ("AAR"), and the National Railway Labor Conference ("NRLC") move for leave to file the attached brief as *amici curiae* in support of the Petition for a Writ of Certiorari. The *amici* are filing this motion because the Respondent has refused to consent to the filing of this brief. Petitioners have consented to the filing of this brief and their letter of consent has been lodged with the Clerk of the Court.

The *amici* seek to file the attached brief to emphasize the importance of the question presented in this case to the airline and railroad industries in the United States—the two industries whose labor relations are regulated by the Railway

Labor Act. The question presented affects the integrity of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in two industries that Congress deemed critical to the national economy. The *amici* represent the collective views of the Nation's major air and rail carriers.

AIRCON was formed in 1946 as a voluntary association of various passenger and air cargo carriers.[1] AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000); *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989); and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

AAR is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. It represents its members in connection with numerous administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this Court in numerous cases, including *Norfolk*

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[1] AIRCON's current members include: ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., Aloha Airlines, Inc., America West Airlines, American Airlines, Inc., ASTAR Air Cargo, Inc., ATA, Continental Air Lines, Inc., Delta Air Lines, Inc., Federal Express Corp., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Independence Air, jetBlue Airways, Northwest Airlines, Inc., Southwest Airlines, United Airlines, United Parcel Service, and US Airways.

Southern Ry. Co. v. Kirby, 125 S. Ct. 385 (2004); *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); and *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).

The members of the NRLC include all United States Class I freight railroads and many smaller lines.[2] The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining with the major rail labor organizations. It also advises railroads on labor-related matters; administers industry-wide health and welfare plans for rail employees; represents the industry on rail labor issues before congressional committees, other governmental bodies, and the courts; provides training programs; and represents railroads in labor arbitration cases before the National Railroad Adjustment Board and other tribunals. NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro Football*, 518 U.S. 231 (1996); and *Conrail v. RLEA*, 491 U.S. 299 (1989).

Because the *amici* represent virtually all of the major air and rail carriers covered by the Railway Labor Act, the views of the *amici* expressed in the attached brief will assist the Court in understanding the scope and impact of the decision below. The decision of the court below exacerbates a conflict among the Courts of Appeals concerning the jurisdiction of federal courts to decide whether a claim filed in state court constitutes a "minor dispute" that must be resolved through the grievance arbitration procedures mandated by Congress. Federal jurisdiction is essential to ensure that these disputes are consistently and finally resolved through the Act's dispute resolution procedures, rather than through a multitude of state

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[2] The Class I freight railroads include BNSF Railway Co., Soo Line Railroad Co., Canadian National Railway Co., CSX Transportation, Inc., Kansas City Southern Railway Co., Norfolk Southern Railway Co., and Union Pacific Railroad Co.

court litigation. By holding that no such federal jurisdiction exists, the court below has threatened the stability of labor relations in the airline and railroad industries. That is why the *amici* seek leave to file the attached brief urging the Court to grant the Petition.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. FEDERAL JURISDICTION IS ESSENTIAL TO THE ORDERLY RESOLUTION OF DISPUTES UNDER THE RLA	3
A. The RLA Establishes Mandatory Dispute Resolution Procedures	3
B. The Act Discourages the Fragmentation of Labor Disputes on a Local or State-by-State Basis	4
C. Federal Jurisdiction Is Essential to the Purpose and Structure of the RLA	5
II. THE STANDARD APPLIED BY THE COURT BELOW THREATENS THE STABILITY OF LABOR RELATIONS IN THE AIR AND RAIL INDUSTRIES	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Air Line Pilots Association v. O'Neill, 499 U.S. 65 (1991)	6
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	5
Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972)	3, 5
Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957)	3, 6
Chicago & North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971)	6
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)	3
International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963)	4, 6, 8
International Association of Machinists v. Central Airlines, Inc., 295 F.2d 209 (5th Cir. 1961)	8
Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930)	6
Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989)	6

FEDERAL STATUTES	
45 U.S.C. § 151a	3
45 U.S.C. § 153	5
45 U.S.C. § 184	4, 5

FEDERAL ADMINISTRATIVE AGENCY CASES	
American Airlines, Inc., 19 NMB 113 (1991)	4
Pennsylvania Railroad Co., 1 NMB 23 (1937)	4

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

Page

ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 68-69 (2004) 7

BUREAU OF TRANSPORTATION STATISTICS, DEP'T OF TRANSPORTATION, NUMBER OF EMPLOYEES–CERTIFICATED CARRIERS 2004 YEAR END DATA, *available at* http://www.bts.gov/programs/airline_information/number_of_employees/certificated_carriers/html/2004.html 7

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST[1]

The interests of the *amici* are set forth in the preceding motion and therefore are not repeated here.

SUMMARY OF THE ARGUMENT

The question presented in the Petition is important to the stability of labor relations on the Nation's airlines and railroads and to the administration of the Railway Labor Act ("RLA" or "Act"). Labor relations stability in the air and rail industries depends in large part on the Act's mandatory

[1] Pursuant to S. Ct. R. 37.6, the *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than the *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

grievance arbitration procedures. Disputes involving the interpretation or application of a collective bargaining agreement (so-called "minor disputes") must be resolved in a uniform and consistent manner. The RLA's mandatory grievance arbitration procedures are the mechanism for ensuring uniformity and consistency—and ultimately labor peace—in two industries Congress has deemed critical to the national economy. This dispute resolution system, carefully crafted by Congress to avoid interruptions to commerce, is jeopardized if disputes that should be resolved through the Act's grievance arbitration procedures are instead resolved in collateral litigation in a different forum.

Ensuring that federal courts have jurisdiction to determine what kinds of disputes are subject to mandatory arbitration under the Act, and thus are removable from state court, is essential to the Act's proper administration. It makes the federal courts available to be the gatekeepers for the grievance arbitration process, and thereby reduces the risk that inconsistent adjudication will lead to disparate treatment of similarly situated employees—a potential source of labor discord that the Act was designed to prevent. To provide for uniform application of the RLA, the critical threshold determination of whether a dispute is a "minor dispute" should be made by federal courts that deal more regularly with the conceptual intricacies of "minor disputes" under the Act. By applying a different standard, the court below exacerbates a conflict among the Courts of Appeals and further increases the likelihood of forum-shopping by litigants who seek to avoid the mandatory minor dispute resolution procedures that are essential to the Act's proper administration.

ARGUMENT

I. FEDERAL JURISDICTION IS ESSENTIAL TO THE ORDERLY RESOLUTION OF DISPUTES UNDER THE RLA.

Labor relations stability in the air and rail industries depends on the resolution of "minor disputes"—disputes involving the interpretation or application of a collective bargaining agreement—through the RLA's grievance arbitration procedures. Federal jurisdiction is essential to fulfilling that fundamental purpose.

A. The RLA Establishes Mandatory Dispute Resolution Procedures.

The Act's primary purpose is to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. To further that goal, Congress established a framework "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements involving rates of pay, rules, or working conditions." *Id.* (emphasis added). As this Court held in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* at 252.

Use of the RLA's dispute resolution procedures is mandatory. In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30 (1957), this Court held that federal courts have jurisdiction to compel use of the National Railroad Adjustment Board procedures to resolve disputes involving the interpretation or application of a collective bargaining agreement (*i.e.*, "minor disputes"). *See also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S.

320 (1972) (confirming that grievance and arbitration procedures for minor disputes under the RLA are compulsory).

Similarly, the Act requires air carriers and their employees, through their selected representatives, to establish adjustment boards to resolve minor disputes. 45 U.S.C. § 184. The duty to use adjustment boards to resolve minor disputes in the airline industry is likewise enforceable in federal court. *See International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

B. The Act Discourages the Fragmentation of Labor Disputes on a Local or State-by-State Basis.

The Act centralizes labor relations throughout a carrier's system to minimize the number and frequency of disputes that could interfere with the smooth flow of passengers and goods by air or rail. Indeed, air and rail transportation systems are inherently interstate in scope, with resulting systemwide or national labor relations schemes. The Act resists the fragmentation of disputes which may threaten labor peace by establishing bargaining relationships and dispute resolution procedures on a nationwide basis.

Under the RLA, unions are certified to represent employees of air and rail carriers in systemwide—*i.e.*, nationwide—crafts or classes determined by the National Mediation Board ("NMB"). *See American Airlines, Inc.*, 19 NMB 113, 126 (1991) ("The Board has long held that representation elections must include a carrier's entire system."); *Pennsylvania Railroad Co.*, 1 NMB 23, 24 (1937) ("The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the whole of a craft or class employed by a carrier.").

In the railroad industry, the Act itself creates a national grievance resolution mechanism in the form of the National Railroad Adjustment Board. 45 U.S.C. § 153. In the airline industry, the Act specifically contemplates the establishment of adjustment boards on a systemwide basis. 45 U.S.C. § 184. The resolution of minor disputes through these national or systemwide procedures creates a uniform industrial order that applies to all employees in a craft or class in whatever state they work.

C. Federal Jurisdiction Is Essential to the Purpose and Structure of the RLA.

Federal jurisdiction to resolve disputes over whether arbitration is required under the RLA protects the integrity of the Act's dispute resolution mechanisms. It precludes courts—both state and federal—from intruding on the adjustment boards' exclusive jurisdiction to resolve all minor disputes that arise in the workplace. As this Court held in applying the doctrine of complete preemption under the National Labor Relations Act: "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law. . . ." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).[2]

Although this Court has not explicitly stated that the doctrine of complete preemption applies under the RLA, the essence of the doctrine is inherent in the decisions this Court has rendered under the RLA. For instance, in *Central Airlines*, the Court held that federal law governs challenges to the validity or enforceability of a system board of adjust-

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[2] In *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), this Court held that because the RLA's dispute resolution mechanisms are statutorily mandated, "the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA." *Id.* at 323.

ment's decision issued pursuant to a collective bargaining agreement: "Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law. . . ." *Central Airlines*, 372 U.S. at 695. The Court explained that the "validity, interpretation, and enforceability" of agreements creating system board procedures "cannot be left to the laws of the many States." *Id.* at 691. "The needs of the subject matter manifestly call for uniformity." *Id.* at 691-92.

Federal jurisdiction over a claim pled under state law, but which involves the interpretation or application of a collective bargaining agreement and thus constitutes a minor dispute, is consistent with a long line of cases recognizing the strong federal interests inherent in the RLA. *See Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 567-68 (1930) (recognizing propriety of federal court action to prevent interference with selection of representatives under the RLA); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 39-40 (1957) (recognizing propriety of federal court action to compel compliance with minor dispute resolution procedures); *Chicago & North Western Ry. Co. v. United Transportation Union*, 402 U.S. 570, 582-83 (1971) (recognizing propriety of federal court injunction against strike during major dispute resolution procedures); *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 432-33 (1989) (applying federal common law concerning reinstatement rights of striking employees under the RLA); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 76 (1991) (describing union's duty of fair representation as a "duty grounded in federal statutes").

A decision affirming federal jurisdiction under the RLA, under the doctrine of complete preemption or otherwise, would discourage employees with claims subject to the RLA's mandatory grievance arbitration procedures from attempting to bypass those procedures by suing in state court.

II. THE STANDARD APPLIED BY THE COURT BELOW THREATENS THE STABILITY OF LABOR RELATIONS IN THE AIR AND RAIL INDUSTRIES.

By holding that no removal jurisdiction exists to determine whether a dispute is minor (and therefore subject to the RLA's mandatory dispute resolution procedures), the decision of the court below threatens to weaken labor relations stability in the air and rail industries. The standard applied below, as well as by the Third and Eleventh Circuits, disperses the important task of determining what is a "minor dispute" to a multitude of state courts, risking the consistency that is so important to these industries.

Air and rail carriers covered by the Act typically operate in numerous states, and many of their employees in the operating crafts (such as locomotive engineers, pilots, trainmen and flight attendants) perform service throughout the carriers' systems. Class I railroads, for instance, employ 154,652 workers in operations that span 44 states and the District of Columbia. *See* ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 68-69 (2004). The vast majority of those employees are represented by a union. Air carriers who are members of AIRCON employ well over 500,000 workers and operate in every state except Delaware. *See* BUREAU OF TRANSPORTATION STATISTICS, DEP'T OF TRANSPORTATION, NUMBER OF EMPLOYEES – CERTIFICATED CARRIERS 2004 YEAR END DATA, *available at* http://www.bts.gov/programs/airline_information/number_of_employees/certificated_carriers/html/2004.html.

Lawsuits raising common law or statutory claims potentially subject to preemption under the Act's mandatory and exclusive grievance arbitration procedures will have that critical threshold issue decided by whatever court the litigant chooses. This will encourage forum-shopping and duplicative litigation, and it will spawn efforts to litigate collateral

state law claims rather than submit to the Act's mandatory grievance arbitration procedures. *Cf. Central Airlines*, 372 U.S. at 691 n.15 ("Is the continuity of essential air traffic to be at the plaintiff's choice of forum? What is to happen when several plaintiffs bring several suits in several states? Is effective federal control of an operational activity deemed so essential to national welfare to be precariously dependent upon the accident of diversity of citizenship?" (quoting *International Ass'n of Machinists v. Central Airlines, Inc.*, 295 F.2d 209, 223 (5th Cir. 1961) (Brown, J., dissenting))).

Such a proliferation of litigation would unnecessarily risk inconsistent decisions with respect to the application of the standard for preemption established in *Norris*, inconsistent decisions about the scope of the grievance arbitration procedure, and quite probably decisions that inconsistently interpret or apply the terms of a collective bargaining agreement. The standard applied by the Sixth Circuit (as well as the Third and Eleventh Circuits) will confuse the boundaries between what is a "minor dispute" subject to the grievance procedure and "other disputes" to be resolved in the state courts.

These outcomes are at odds with the structure of the RLA, which seeks to ensure labor peace in two industries at the heart of interstate commerce by establishing a cohesive and highly centralized system of labor dispute resolution. As this Court noted in *Central Airlines*:

> Congress in 1936 could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of [50] states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration.

Central Airlines, 372 U.S. at 691 n.15 (quoting *International Ass'n of Machinists v. Central Airlines, Inc.*, 295 F.2d 209, 221-22 (5th Cir. 1961) (Brown, J., dissenting)). The same

logic applies with equal force in this case, and with the same implications for industrial peace and stability in both the air and rail industries.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 19 2005
OFFICE OF THE CLERK

No. 05-106

In the Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INC.; TRACY MILLER; LAURENCE T. WIZAUER; DAVID CROMIE; PETER BRANDON; THOMAS WILLETT; LAWRENCE R. MARTENIS,

Petitioners,

v.

JAMES T. RODDY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Whether "Federal Preemption" is a "Federal Question" or merely a defense to a state law cause of action.

Whether the doctrine of "Complete Preemption" should, for the first time be applied by this Court to a "minor dispute" subject to mandatory arbitration under section 3 of the Rail Labor Act 45 U.S.C. § 153.

Whether Respondent's original complaint states a "Federal Question" under the "Well Plead Complaint" doctrine. (*See* App "I")

Whether the Rail Labor Act (RLA) provides "Federal Removal Jurisdiction" for "minor disputes". (*See* 45 U.S.C. § 153)

PARTIES TO THE PROCEEDINGS

The only parties in the court below are those listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Respondent JAMES T. RODDY makes the following disclosure:

1. Said party is not a subsidiary or affiliate of a publicly owned corporation.

2. There is no publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome.

August 19, 2005

TABLE OF CONTENTS

RESTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPPOSITION TO WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

COUNTER STATEMENT OF THE CASE 3

i. Statutory Background 4

ii. Counter Statement of Facts 7

Taken from the U.S. Six Circuit's Statement of Facts 7

The Sixth Circuit reasoned; 9

Complete Preemption; 10

The U.S. Sixth Circuit agreeing with the Third Circuit; 10

The U.S. Sixth Circuit agreeing with the Eleventh Circuit; 10

The Sixth Circuit Finally agreeing with this Court in; 12

iii. Restatement of facts 13

iv. Restatement of proceedings and Disposition Below 16

v. Respondents initial complaint fails state a "Federal Question" under the "Well Plead Complaint" doctrine. 17

REASONS FOR DENYING THE PETITION 19

CONCLUSION 30

PRAYER FOR RELIEF 30

APPENDIX 1- Circuit Court for the County of Shiawassee Case No. 02-8184 Complaint 1b

TABLE OF AUTHORITIES

Cases

Accord Beers v. S. Pac. Transp. Co.,
703 F.2d 425 (9th Cir. 1983) 21

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 28

Alongi v. Ford Motor Co.,
386 F.3d 716 (6th Cir. 2004) 23

AmSouth Bank v. Dale,
386 F.3d 763 (6th Cir. 2004) 11

Anderson v. Am. Airlines, Inc.,
2 F.3d 590 (5th dr. 1993) 21

Arbogast v. CSX Corp.,
831 F.2d 290 (unpublished table decision),
reported in full at 1987 WL 38662 (4th Cir. 1987) . 21

Beneficial Nat. Bank v. Anderson,
539 U.S. 1 (2003) 9, 10, 18, 22, 23, 24, 27

Caterpillar, Inc. v. Williams,
482 U.S. 386, 392 (1987) . . . . . *passim*

Deford v. Soo Line R.R.,
867 F.2d 1080 (8th Cir. 1989) 21

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 24

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 22, 25

Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,
463 U.S. 1 (1983) 19, 23, 26

Geddes v. Am. Airlines, Inc.,
321 F.3d 1349 (11th Cir. 2003) 10, 11, 12

Graf v. Elgin, Joliet & Eastern Railway,
790 F.2d 1341 (7th Cir. 1986) 20

Grote v. Trans World Airlines, Inc.,
905 F.2d 1307 (9th Cir. 1990) 21

Gully v. First Nat. Bank in Meridian,
299 U.S. 109 (1936) 22, 26

Hawaiian Airlines v. Norris,
512 U.S. 246, L. Ed. 2d 247 (1994) . . . . . *passim*

Leu v. Norfolk & W. Ry.,
820 F.2d 825 (7th Cir. 1987) 20

Loftis v. United Parcel Serv., Inc.,
342 F.3d 509 (6th Cir. 2003) 9

Louisville & Nashville R. Co. v. Mottley,
211 U. S. 149 (1908) 23, 26

McAlester v. United Air Lines, Inc.,
851 F.2d 1249 (10th Cir. 1988) 29

McDonald v. City of West Branch,
466 U.S. 284, 80 L. Ed. 2d 302,
104 S. Ct. 1799 (1984) 23, 28

Metro. Life Ins. Co. v. Taylor,
481 U.S. 58 (1987) . . . . . *passim*

Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.,
858 F.2d 936 (3d Cir. 1988) 10, 22

Rivet v. Regions Bank,
522 U.S. 470 (1998) . . . . . *passim*

Ryan v. City of Shawnee,
13 F.3d 345 (10th Cir 1993) 29

Salone v. United States,
645 F.2d 875 (10th Cir.) 29

Schroeder v. Trans World Airlines, Inc.,
702 F.2d 189 (9th Cir. 1983) 21

Shafii v. British Airways, PLC,
83 F.3d 566 (2d Cir. 1996) 21

Skinner v. Railway Labor Executives' Association,
489 U.S. 602 (1989) 13, 14, 16, 30

Taylor v. Anderson,
234 U. S. 74 (1914) 23

Statutes

12 U.S.C. §§ 85 & 86 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 . . . . . 2, 9, 24, 25

28 U.S.C. § 1441 . . . . . 2, 9, 19, 24, 26

29 U.S.C. § 1001 23

29 U.S.C. § 185, § 502(a) 23

42 U.S.C. § 2014(hh) 24

45 U.S.C. § 153 (p) 17, 18, 20

45 U.S.C. § 153 (q) 17, 18, 20

MCL § 37.2101 . . . . . *passim*

MCL § 37.2102 4

MCL § 37.2201 4

MCL § 37.2205a 4, 8, 17

MCL § 37.2701 5

MCL § 37.2801 . . . . . 6, 17

MCL § 37.2802 7

MCL § 37.2803 . . . . . 7, 19

Regulations

49CFR § 219.1 . . . . . 3, 11,13

49CFR § 219.13 16

49CFR § 219.201 16

49CFR § 219.300 . . . . . 14, 16

49CFR § 219.5 16

49CFR § 219.601 16

49CFR § 219.901 20

OPPOSITION TO WRIT OF CERTIORARI

Respondent respectfully opposes the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's App. 1a-14a) is reported at 395 F.3d 318 (6th Cir. 2005). Both the district court's order denying respondent's motion to remand (Petitioner's App. 15a), and the transcript containing its bench ruling in support of that order (Petitioner's App. 16a-27a), are unreported, as is the district court's memorandum opinion and order granting petitioners' motion for summary judgment (Petitioner's App. 28a-41a).

JURISDICTION

The judgment of the court of appeals Petitioner seeks to review was entered on January 14, 2005. The U.S. Sixth Circuit Court of Appeals denied a timely petition for rehearing on March 15, 2005. (Petitioner's App. 47a-48a.) Petitioners' requested more time to file a petition for a writ of certiorari. This request was granted by Justice Stevens extending the time for the filing of the petition for writ of certiorari until July 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondent agrees with Petitioners statement of jurisdiction for this petition, but also agrees with the U.S. Sixth Circuit of the issue of removal jurisdiction (Subject Matter Jurisdiction).

STATUTORY PROVISIONS INVOLVED

This case concerns 28 U.S.C. § 1331 and 28 U.S.C. § 1441, and the Michigan "Elliott-Larsen civil rights act" MCL § 37.2101 et. sec.

INTRODUCTION

This action was commenced in the Shiawassee County Circuit Court for the State of Michigan on June 22, 2002. The cause of action filed contains alleged violations of the Michigan Elliot Larsen Civil Rights act being MCL § 37.2101 *et. seq.* and relief specifically provided for in the Act. On or about July 19th 2002 the Defendant-Appellees-Petitioners ("Petitioners" "GTW") filed an answer to the complaint and filed a Joint Removal to the U.S. District Court for the Eastern District of the Michigan. Plaintiff-Appellant James T. Roddy ("Plaintiff" "Respondent" or "Roddy") appealed the district court's denial of his motion to remand and the district court's subsequent grant of summary judgment in favor of the Defendants-Appellees-Petitioners, Grand Trunk Western Railroad, Inc., Tracy Miller, Lawrence T. Wizauer, David Cromie, Peter Brandon, Thomas Willett and Lawrence Martenis (collectively referred to as "Petitioners", "GTW" or "Defendants").

The U.S. Court of Appeals for the Sixth Circuit reversed the denial of the motion to remand, vacated the entry of summary judgment, and remanded to the district court with instructions to the U.S District Court to enter an order remanding the entire case to state court for lack of removal jurisdiction (Subject Matter Jurisdiction) without reaching the question of whether Roddy's state claim is in fact preempted by Federal Law.

The Sixth Circuit Court of Appeals then denied Petitioners petition for rehearing on March 15, 2005 (Petitioners Appendix 47a-48a) Petitioners request for extension of time for filing a petition for writ of Certiorari was extended by Justice Stevens as Circuit Justice until July 13, 2005.

COUNTER STATEMENT OF THE CASE

This action was commenced in the Shiawassee County Circuit Court for the State of Michigan on June 22, 2002. The cause of action filed contains alleged violations of the Michigan Elliot Larsen Civil Rights act being MCL § 37.2101 *et. seq*. On or about July 19th 2002 the Petitioners filed an answer to the complaint and a Joint Removal to the U.S. District Court for the Eastern District of the Michigan in Detroit. Respondent thereafter filed a motion for remand back to state court for lack of subject matter jurisdiction. The U.S. District Court denied the motion in an Order dated October 4, 2002.

Thereafter the Petitioners filed a motion for summary judgement alleging, (1) the Michigan Elliot-Larson Civil Rights Act does not apply to individuals, (2) Plaintiff-Appellant's complaint fails to state a claim, that the US District Court lacks subject matter jurisdiction as a result of complete preemption by the RLA and the implementing regulations for the Federal Railroad Safety Act at (49CFR § 219.1 *et. seq*.), (3) The Michigan Elliot-Larson Civil Rights Acts prohibition against requesting, making or maintaining a record of a misdemeanor arrest that does not result in a conviction applies only to prospective employees.

On November 21, 2002 U.S. District Court Judge Nancy Edmonds granted Petitioner's motion on the basis of complete preemption and made no ruling on the other claims for summary judgment.

i. Statutory Background

The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief as provided for under the provisions of the "act". The Elliot Larson civil rights act provides:

MCL § 37.2101 Short title. [M.S.A. 3.548(101)]

Sec. 101. This act shall be known and may be cited as the Elliott-Larsen civil rights act"...

MCL § 37.2102 Recognition and declaration of civil right; action arising out of discrimination based on sex or familial status. [M.S.A. 3.548(102)]

Sec. 102. (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right...

ARTICLE 2

MCL § 37.2201 Definitions. [M.S.A. 3.548(201)]

Sec. 201. As used in this article:

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person...

MCL § 37.2205a Employer, employment agency, or labor organization; record of information regarding misdemeanor arrest, detention, or

disposition; failure to recite or acknowledge information; "law enforcement agency" defined.

Sec. 205a. (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal...

ARTICLE 7

MCL § 37.2701 Prohibited conduct. [M.S.A. 3.548(701)]

Sec. 701. Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

(b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.

(c) Attempt directly or indirectly to commit an act prohibited by this act.

(d) Willfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives.

(e) Willfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.

(f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act...

ARTICLE 8

MCL § 37.2801 Action for injunctive relief or damages; venue; "damages" defined. [M.S.A. 3.548(801)]

Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees...

MCL § 37.2802 Costs of litigation. [M.S.A. 3.548(802)]

Sec. 802. A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate...

MCL § 37.2803 Legal or equitable remedies. [M.S.A. 3.548(803)]

Sec. 803. This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of the state... (*Emphasis supplied*)

Petitioners removed the action to federal court re-characterizing it as a federal claim on the basis of federal question jurisdiction citing complete preemption by the Rail Labor Act ("RLA") as the basis. The District Court denied Roddy's motion for remand and granted GTW's motion for summary judgment on the basis of preemption. Roddy appealed both of these rulings to the U.S. Sixth Circuit Court of Appeals.

ii. Counter Statement of Facts

Taken from the U.S. Six Circuit's Statement of Facts

"Roddy alleged in his complaint that he began his employment for Grand Trunk in 1965 as a brakeman. In 2000 Roddy was employed by Grand Trunk as a conductor. On July 11, 2000, while driving a motor

vehicle on personal business, Roddy was subjected to a routine traffic stop by the City of Durand, Michigan, Police Department. He was arrested and jailed on misdemeanor charges including possession of marijuana. Roddy's wife notified Grand Trunk that Roddy was unavailable for work on the night of July 11, 2000.

Roddy alleged in his complaint that the individual defendants, who are employees and/or agents of Grand Trunk, requested, made or maintained a record of information regarding Roddy's misdemeanor arrest or detention. Based upon those records Grand Trunk conducted a formal company investigation on a charge of possession of marijuana and ultimately terminated Roddy's employment. The misdemeanor charges that had been filed against Roddy on July 11, 2000 were eventually dismissed and no conviction resulted. Roddy commenced this action in the Circuit Court for the County of Shiawassee, State of Michigan, alleging that Grand Trunk's conduct in requesting, making or maintaining a record of the misdemeanor arrest where a conviction did not result, and their conduct in threatening, coercing, and/or ordering Roddy to release information regarding the misdemeanor arrest or face further disciplinary action violated Roddy's rights under the Michigan Elliott Larsen Civil Rights Act, MCL § 37.2205a. The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief. Defendants removed the action to federal court on the basis of federal question jurisdiction. The district court denied Roddy's motion for remand and granted Defendant's (GTW's) motion for summary judgment. Roddy appealed both of these rulings.

The Sixth Circuit reasoned;

> "That the longstanding rule that "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing 28 U.S.C. § 1441(a)). "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim. "*Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003).
>
> Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether a complaint arises under federal law we apply the "well-pleaded complaint" rule. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003). Under this rule "we examine the 'well pleaded' allegations of the complaint and ignore potential defenses." *Beneficial Nat. Bank*, 539 U.S. at 6. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. The well-pleaded complaint rule recognizes that the plaintiff is the master of his complaint. *Loftis*, 342 F.3d at 515. Accordingly, if the plaintiff chooses to bring a state law claim, that claim cannot generally be "recharacterized" as a federal claim for the purpose of removal. *Id.* (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). It is settled law that "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the

federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393 (emphasis in original). *See also Beneficial Nat. Bank*, 539 U.S. at 6 ("[A] defense that relies on the pre-emptive effect of a federal statute will not provide a basis for removal."); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.").

Complete Preemption;

The U.S. Sixth Circuit agreeing with the Third Circuit;

The Third Circuit similarly found "no evidence in the RLA or its legislative history of a Congressional intent to permit recharacterization and removal of what purports to be a state claim." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988)."...

The U.S. Sixth Circuit agreeing with the Eleventh Circuit;

"The Eleventh Circuit examined the RLA in *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349 (11th Cir. 2003). Based upon the language and substance of the RLA and its legislative history, the Eleventh Circuit concluded that the RLA did not have the extraordinary preemptive force necessary to create federal removal jurisdiction. *Id.* at 1357. The court noted that in contrast to the LMRA and ERISA, the RLA does not create a federal cause of action for the resolution of disputes. *Id.* at 1354. Accordingly, federal courts are not in a position to fashion a cohesive body of federal

law for enforcement of collective bargaining agreements under the RLA. *Id.* Moreover, there is no indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment. *Id.* ... On review we conclude that the Eleventh Circuit's analysis of the RLA in *Geddes*, 321 F.3d at 1353- 57, is most consistent with the Supreme Court's instructions on how to approach issues of complete preemption. Complete preemption represents a substantial departure from the firmly established well- pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect. We agree with the Eleventh Circuit that Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court."... Grand Trunk has suggested in the alternative that the district court's finding of complete preemption finds support in the Railroad Administration Regulations at 49CFR § 219.1 *et seq.* In *AmSouth Bank v. Dale*, 386F.3d 763,776 (6th Cir. 2004) we rejected the contention that a federal regulation could completely preempt state law claims. We noted that although an agency has the ability to promulgate regulations with the force of federal law and therefore has the ability to preempt state causes of action through ordinary preemption, it does not have the ability to create a right of action where Congress has not intended it do so. 386 F.3d at 776-77. "While the agency can create federal law, it cannot expand federal jurisdiction." *Id.* at 777. We conclude that there was no removal jurisdiction in this case and that the case should be remanded to state court. Because there is no removal jurisdiction, we do not have jurisdiction to reach the question of whether

> Roddy's state claim is in fact preempted by federal law (complete citation added)... We agree with the Third and Eleventh Circuits that "[s]tate courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Geddes,* 321 F.3d at 1357 (quoting *Ry. Labor Execs. Ass 'n*, 858 F.2d at 942). *See also Price*, 829 F.2d at 876 ("We express no opinion on the merits of PSA's federal preemption defense. We have confidence in the ability and willingness of state courts to enforce federal defenses.").

The Sixth Circuit Finally agreeing with this Court in;

> "*Hawaiian Airlines v.Norris*, 512 U.S. 246, L. Ed. 2d 247 (1994) (complete citaion added) (emphasis in original). We conclude that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction." (Petitioner's Appendix A at page 1a) Here the Defendants' have attempted to claim "artful pleading" by Plaintiff to avoid a federal question. The "artful pleading" doctrine allows removal where federal law completely preempts a plaintiff's state law claim. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. at 65-66"...

The issue becomes does federal law completely preclude plaintiff's state civil rights claim?

Hawaiian Airlines. v. Norris, at pages 255-256 provides some light for this court.

> "Significantly, the adjustment boards charged with administration of the minor-dispute provisions have

understood these provisions as pertaining only to disputes invoking contract-based rights. See, e.g., NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award No. 19790 (1973) (-this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement-); Northwest Airlines/Airline Pilots Assn., Int'l System Bd. of Adjustment, Decision of June 28, 1972, p. 13 (both the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]-); United Airlines, Inc., 48 LA 727, 733 (BNA) (1967) (The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act-)." (*Emphasis supplied*)

iii. Restatement of facts

Petitioners would have this Court believe the Federal Regulations 49CFR § 219.1 et sec. are an intricate part of the Collective Bargaining Agreement (hereinafter CBA) and that they have and affirmative duty to investigate and discipline employees for off duty activities that arguably involve these regulations. This is simply not supported by the clear reading of the regulations and this court's prior holdings. (*Skinner Infra*)

The Regulations in question provide a limited exception to the Fourth Amendment to the U.S. Constitution. (*See Skinner*

v. Railway Labor Executives' Association Infra) These regulations prohibit on the job possession of alcohol and illegal substances and use of the same on or off duty if it would cause on duty impairment. (*See* 49CFR § 219.101) The purpose of these regulations is to provide for drug and alcohol testing to determine current impairment of on duty employees. (*See* 49CFR § 219.1(a)) In this matter, no on duty use or possession was proven or alleged. Further, Petitioners never gave Roddy the test required under the regulations to determine if Roddy was in any way impaired during "covered service". (*See* 49CFR § 219.300 Mandatory reasonable suspicion testing)

> *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 613-618 (1989)... Among other things, Subpart C of the regulations requires railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents, while Subpart D authorizes, but does not require, railroads to administer breath or urine tests, or both, to covered employees who violate certain safety rules... The Court of Appeals reversed, ruling, inter alia, that a requirement of particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable under the Fourth Amendment. The court stated that such a requirement would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current impairment.

Held:

The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the FRA regulations. Pp. 613-618.

(a) The tests in question cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C does so by compulsion of sovereign authority, and therefore must be viewed as an instrument or agent of the Government. Similarly, even though Subpart D does not compel railroads to test, it cannot be concluded, in the context of this facial challenge, that such testing will be primarily the result of private initiative, since specific features of the regulations combine to establish that the Government has actively encouraged, endorsed, and participated in the testing. Specifically, since [489 U.S. 603] the regulations preempt state laws covering the same subject matter, and are intended to supersede collective bargaining and arbitration award provisions, the Government has removed all legal barriers to the testing authorized by Subpart D. Moreover, by conferring upon the FRA the right to receive biological samples and test results procured by railroads, Subpart D makes plain a strong preference for testing and a governmental desire to share the fruits of such intrusions. In addition, the regulations mandate that railroads not bargain away their Subpart D testing authority, and provide that an employee who refuses to submit to such tests must be withdrawn from covered service. Pp. 614-616."

Seems quite clear, Railroad Employers have been given a limited exception to the Fourth Amendment. They are only

authorized to test "covered employees" for current impairment from drugs and alcohol under four conditions, "Post Accident/Incident" (49CFR § 219.201), "Reasonable suspicion" (49CFR § 219.300), "Probable Cause" (49CFR § 219.301) and "Randomly" (49CFR § 219.601). This limited exception does not include an employee's off duty activities only to the extent he may test positive for current impairment when reporting for duty. The Petitioners problem here is that Respondent was arrested for possession not use.

> 49CFR § 219.5 Definitions...Possess means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property. *(Emphasis supplied)*

Further, Petitioners never complied with the regulations and actually performed a drug and alcohol test on the Respondent. (*See* 49CFR § 219.300 Mandatory reasonable suspicion testing) Without such a test showing current impairment Petitioners have no authority to order Respondent into the EAP program to begin with, as it is a regulatory requirement not a CBA issue. (*See* 49 CFR § 219.104) and *Skinner Supra* "the regulations preempt state laws covering the same subject matter, and are intended to supersede collective bargaining and arbitration award provisions," (*See also* 49CFR § 219.13 Preemptive effect)

iv. Restatement of proceedings and Disposition Below

GTW compared Roddy's complaint and arbitration demand to justify the recharacterization and removal of what is strictly a state law cause of action. GTW stated the following at page 9 of their Petition for Certiorari:

> "Prior to the arbitration award, Roddy also filed a complaint against GTW and the other petitioners (GTW officials) in Michigan state court, which covered much of the same ground as his RLA arbitration. Like Roddy's arbitration demand, the complaint stated that it concerned the "terms, conditions, or privileges of [Roddy's] employment." Compl. ¶91 17, 30."

This is a misleading statement See **MCL § 37.2801** and **MCL § 37.2205a** *supra;* Respondent has requested the relief provided for under the Michigan Elliott-Larsen Civil Rights Act, to wit:

> Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both...(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees.

The "Adjustment Board" simply has no power to issue injunctive relief, or attorneys fees. Further, it does not have "subject matter" jurisdiction to hear state civil rights claims. (*See* 45 U.S.C. § 153 (p) and 45 U.S.C. § 153 (q) below).

v. Respondents initial complaint fails state a "Federal Question" under the "Well Plead Complaint" doctrine.

The Respondent is aware of no sections of the RLA authorizing an action to enforce the Michigan ELLIOTT-LARSEN CIVIL RIGHTS ACT (Act 453 of 1976). The only sections of the RLA vesting this court with a Federal Question/ Subject Matter Jurisdiction over "minor disputes" are those involving enforcement of an order of the Adjustment

Board (45 U.S.C. § 153 (p) and grievances concerning the award itself (45 U.S.C.§ 153 (q) below).

> "45 U.S.C. § 153 (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties...
>
> 45 U.S.C. § 153 (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order"...

The most recent case cited by the Sixth Circuit Court of Appeals is "*Beneficial Nat. Bank v. Anderson, Supra; (See also) Hawaiian Airlines v. Norris Supra and; Rivet v. Regions Bank*, 522 U.S. 470 (1998):

The *Rivet* case provided as follows:

> (a) Respondents invoked, in support of removal, the district courts' original federal question jurisdiction under 28 U.S.C. § 1441(b). The presence or absence of such jurisdiction is governed by the "well pleaded complaint rule," under which "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, [522 U.S. 471] Because a defense is not part of a plaintiff's properly pleaded statement of his or her claim, see, e.g., *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, removal of a case to federal court may not be predicated on the presence of a federal defense. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, (1983)

A reading of Respondent's Complaint will produce no contractual claims or remedies. (*See* App 1) Respondent seeks to enforce only the State Civil Rights Act independent of any contractual remedies. The Elliot Larson Civil Rights Act (Act) provides for a remedy that is "In addition to any other remedy provided by law". (*See* MCL § 37.2803) Respondent herein asserts that Petitioners have once again failed to state a Federal Question.

REASONS FOR DENYING THE PETITION

1. Petitioners attempt to persuade this court there is a conflict among the Circuits as to the Complete Preemption of state law by the RLA. Petitioners again attempt to characterize Respondent's complaint as a minor dispute under the RLA as they did in the U.S. District Court. This position was completely rejected by the U.S. Sixth Circuit Court of Appeals. Respondent has through the RLA dispute resolution

procedures been reinstated and received all but 90 days of the three years pay lost. (Petitioners App42a-43a)

2. Respondent seeks additional relief that includes injunctive relief provided for in the Michigan Elliot Larson Civil Rights Act otherwise unavailable from the Adjustment Board. The injunctive relief sought by Respondent is to prevent the Petitioners from further violations of the "Act" not as Petitioners allege "an injunction to prevent GTW from imposing further discipline based on Roddy's arrest" (Petition for Writ page 9)

3. Respondent also prayed Petitioners pay his attorney fees compensatory damages, exemplary damages and to destroy the documents illegally held. (Elliot Larson Civil Rights Act, *See also* 49CFR § 219.901 Subpart J Recordkeeping Requirements)

4. The RLA provides for only two functions for the Federal Courts with regard to "minor disputes", *see* 45 U.S.C. § 153 (p) and 45 USCA § 153 (q) *supra*. The U.S. District Courts provide an enforcement function under 45 U.S.C. § 153 (p) and an appellate function under 45 U.S.C. § 153 (q) only after an award by the National Railroad Adjustment Board (NRAB) is published. There is no Federal cause of action for "minor disputes" beyond this.

5. Petitioner alleges several Circuit Court decisions are in conflict with the 6th Circuit's ruling in the instant case, in order to invoke this Courts jurisdiction, further delay, impede, and cause undue expense to the proceedings. It must be remembered this action began June 22, 2002.

Seventh Circuit. In *Graf v. Elgin, Joliet & Eastern Railway*, 790 F.2d 1341 (7th Cir. 1986), *Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987);

This dispute was for "a railroad worker's claim of wrongful discharge" which is a RLA Dispute, as opposed to a state Civil Rights Act as we have in the instant case.

Fourth Circuit. In *Arbogast v. CSX Corp.*, 831 F.2d 290 (unpublished table decision), reported in full at 1987 WL 38662 (4th Cir. 1987);

This case involved an unpublished opinion and a state "action seeking penalties under a West Virginia statute for failure to pay wages promptly", again the duty to pay wages flows from the CBA as opposed to a state Civil Rights Act as we have in the instant case.

Eighth Circuit. *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir. 1989);

Ninth Circuit. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990); *Accord Beers v. S. Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983), *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983);

Both Eight and Ninth Circuits basically holding that state law claims that constitute minor disputes "are completely preempted by the RLA," thus cannot be remanded to state court.

Fifth Circuit. *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 594 (5th dr. 1993); Holding that the particular state claims asserted in Anderson did not constitute "minor disputes" and therefore were not removable.

Second Circuit. *Shafii v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir. 1996) Holding that the particular state claims asserted in Shafii did not constitute "minor disputes" and therefore were not removable.

Third Circuit. In *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) ("P&LE"), the Third Circuit held that state law claims that constitute "minor disputes" are outside federal question jurisdiction. It reasoned that Congress had "fail[ed] to create in the RLA a civil enforcement action" in federal court, and that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiffs exclusive reliance on state law." Id. at 942- 4312

There appears to be from Petitioners pleadings above only two real conflicts among the Circuits the Eight and Ninth Circuits holdings of Complete Preemption by the RLA.

There is or should be no Circuit Split in light of this Court's opinions subsequent to these Circuit decisions concerning "Removal Jurisdiction", "Preemption", "Complete Preemption", "Federal Question Jurisdiction" and the "Well Plead Complaint" doctrine. This Court's opinions in *Beneficial* and *Rivet* subsequent to all but the six 6th Circuit in the instant matter.

Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 6 (June 2, 2003) *Supra*;

Rivet v. Regions Bank, 522 U.S. 470 (1998) citing; *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394,397, n. 2 (1981),*Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) and *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) *Infra*;

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) *Supra;*

McDonald v. City of West Branch, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) *Infra*

Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U. S. 1 (1983) *Supra*;

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) *Infra*;

See also Taylor v. Anderson, 234 U. S. 74 (1914);

Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 152 (1908) *Infra*;

6. The doctrine of "Complete Preemption" should not for the first time be applied to "minor disputes" under the Rail Labor Act 45 U.S.C. § 153. To date the Supreme Court has recognized complete preemption under only three statutes:

> "§ 301 of the Labor Management Relations Act, 1947 *LMRA*, 29 U.S.C. § 185, § 502(a) of the Employee Retirement Income Security Act of 1974 *ERISA*, 29 U.S.C. § 1001 et seq., and § 30 of the *National Bank Act*, 12 U.S.C. §§ 85 & 86. *Beneficial Nat. Bank*, 539 U.S. at 6-7, 11. As we noted in *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir. 2004), it is the "unusually powerful pre-emptive force of § 301" that places it in the small category of statutes that not only preempt state law but also authorize removal of actions that sought relief only under state law. *Id.* at 723-24, (quoting *Beneficial Nat. Bank*, 539 U.S. at 7). In those cases where the Supreme Court has found complete preemption, "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank*, 539 U.S. at 8. See also the *Price-Anderson Act*

> contains an unusual preemption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. *Beneficial Nat. Bank*, 539 U.S. at 6 (*citing El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999))". (*Emphasis supplied*) (Quoted from Petitioner's Appendix A at page 3a U.S. Sixth Circuit's opinion)

7. Respondent's original complaint does not state a "Federal Question" under the "Well Plead Complaint" doctrine. (*See* Respondents Complaint, App. 1 at 1b through 9b)

8. There is a point of agreement between the Petitioner, the Respondent and the U.S. Sixth Circuit, namely that the District Court lacks "subject matter" jurisdiction of this case. It is the Respondent's position that the complaint filed herein does not contain a "federal question" since it is not founded on a claim or right arising under the Constitution, treaties or laws of the United States. (*See* 28 U.S.C. §§ 1331 and 1441 (b)) The Petitioner in its Motion for Summary Disposition contended that the U.S District Court did not have "subject matter" Jurisdiction. Respondent agrees. "Subject matter" jurisdiction is the court's power to hear and determine cases of the general class or category to which the proceedings in question belong. "Subject matter" jurisdiction can never be waived, cannot attach by mutual consent of the parties, or through lapse of time or course of events other than provided by Constitution or Statute. The United States Supreme has addressed this issue in a 9-0 decision *Rivet v. Regions Bank*, 522 U.S. 470 (1998) decided the "well pleaded complaint

rule" governs removal and remand actions and "subject matter" jurisdiction. The *Rivet* Court stated:

> "Congress has provided for removal of cases from state court to federal court when the plaintiff's complaint alleges a claim arising under federal law. Congress has not authorized removal based on a defense or anticipated defense federal in character. This case presents the question whether removal may be predicated on a defendant's assertion that a prior federal judgment has disposed of the entire matter, and thus bars plaintiffs from later pursuing a state law-based case. We reaffirm that removal is improper in such a case. In so holding, we clarify and confine to its specific context the Court's second footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n. 2 (1981). The defense of claim preclusion, we emphasize, is properly made in the state proceeding, subject to this Court's ultimate review. ... A state court action may be removed to federal court if it qualifies as a "civil action . . . of which the district courts of the United States have original jurisdiction," unless Congress expressly provides otherwise. 28 U.S.C. § 1441(a). In this case, respondents invoked, in support of removal, the district courts' original federal question jurisdiction over "[a]ny civil action . . . founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b); see also 28 U.S.C. § 1331. We have long held that [t]he presence or absence of federal question jurisdiction is governed by the "well pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar Inc.*

v. Williams, 482 U.S. 386, 392 (1987); see also *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). A defense is not part of a plaintiff's properly pleaded statement of his or her claim. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) ("To bring a case within the [federal question removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."). Thus, a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14 (1983)... In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review" *Rivet v. Regions Bank, supra. (Emphasis supplied)*

9. Utilizing the "well pleaded rule" the Plaintiff's complaint is founded entirely upon the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. To bring a case within the "federal question" removal statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the Plaintiff's claim. Plaintiff's "well pleaded" complaint does not contain an "essential element a right or immunity created by the Constitution or laws of the United States". The only claim that is a colorable claim of federal law is the Defendant's

pleaded defense of preemption. Under *Beneficial* and *Rivet* a federal defense, even if anticipated, does not allow removal from the State Court.

> "We therefore clarify today that Moitie did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense." Rivet at page 478.

10. Thus, the preemption Petitioners raise is properly a defense to be resolved by the Michigan State Courts and ultimately if necessary the United States Supreme Court. Exactly, the procedural situation of *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 248 (1994) (*Supra*) applying the Railway Labor Act and specifically preemption of State Law causes of action.

It is beyond question that the complaint filed by Respondent in this matter is purely an action to enforce the "civil rights" conferred upon the Plaintiff by the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. The Respondent alleges that the individual Petitioners engaged in prohibited conduct. The Petitioners seek to cloak the personal wrongdoing of these individuals under the Railway Labor Act. The General purpose of the Railway Labor Act does not include the enforcement of State or Federal declared civil rights. (*See* 45 U.S.C. § 151a) In Plaintiff's case the loss of past and future earnings and benefits <u>are the measure of the damage</u> suffered by Respondent and not the subject matter of his complaint. It would be for the state Judge to decide the appropriate remedies. These issues are not properly a matter for the Federal District Court as they do not present a "Federal Question" for the Federal District Court to consider.

11. Respondent disputes whether his Michigan Elliot Larson Civil Rights Act complaint constitutes a Federal Question rightfully removed to the Federal District Court. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) the United States Supreme Court held that a Title VII race discrimination claim not foreclosed by prior submission to arbitration under collective bargaining agreement because the employee's rights under Title VII were not part of the collective bargaining process and cannot be prospectively waived. (*Emphasis supplied*)

> "We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo." *Alexander v. Gardner-Denver Co.*, at page 60-61. This rational was further explained by the United States Supreme Court in *McDonald v. City of West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) The Court pointed out that because an arbitrator's expertise pertains to the law of the shop rather than the law of the land, the arbitrator may not have "the expertise required to resolve the complex legal issues presented by the civil rights statutes." *Id. at 290.* Second, because an arbitrator is authorized only to interpret the collective bargaining agreement, he has no authority to enforce the civil rights laws should the rights protected by those statutes conflict with the agreement. *Id. at 290-91.* Third, because the interests of the union and the individual employee are not always coextensive, and because the union usually

has exclusive control over presentation of the grievance, the "employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *Id. at 291.* Finally, the Court observed that "arbitral fact-finding is generally not equivalent to judicial fact-finding." Id. n1" (*See also McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1254-55 (10th Cir. 1988); *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir 1993); *Salone v. United States, 645 F.2d 875* (10th Cir.), *cert. denied*, 454 U.S. 894, 70 L. Ed. 2d 208, 102 S. Ct. 390 (1981).

Since, admittedly the Adjustment Board has no jurisdiction to hear and rule upon a "Civil Rights" case and even in the face of a Board decision the federal courts have allowed "civil rights" case to continue it is not possible to say that the RLA completely preempts "civil rights" claims.

In view of the direction of the United States Supreme Court in *Rivet* this defense affords the District Court no "subject matter" jurisdiction in this cause. Even though the District Court denied the Respondent's motion to remand, once it becomes clear that it lacks federal "subject matter" jurisdiction it must remand to the state court. (*See Rivet v. Regions Bank, supra*) The issue of preemption should therefore be properly decided in state court after it has determined the validity of Respondent's state claim.

CONCLUSION

The arguments of the Petitioners do not preclude the Respondent's complaint. There is no issue of material fact that the Petitioners requested, made or maintained a record of a misdemeanor arrest that did not result in a conviction.

Respondent should be afforded his "civil rights" as expressed by the State of Michigan. Respondent's Complaint alleges acts by individuals that violate the rights created by the Michigan Elliot Larson Civil Rights act in requesting, making or maintaining a record of a misdemeanor arrest that did not result in a conviction. This is purely a factual dispute about an employer's conduct not his motives. There is no need to refer to the CBA to determine if the Petitioners violated the Michigan Elliot Larson Civil Rights Act. Subsequently, it is alleged that the Petitioners coerced the Respondent to forego his rights not to discuss this misdemeanor arrest, an expressed "civil right". Again, this is purely a factual dispute not requiring interpretation of the CBA. The Respondent's complaint alleges a state cause of action created under the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. These rights are independent of the CBA. As such under the 6 decades of Supreme Court precedents cited herein the matter is and cannot be preempted by the Railway Labor Act.

As to preemption under the Federal Regulations, the Regulations apply to "on duty" impairment use or possession and create a limited exception to the Fourth Amendment, as such they must be strictly construed. They allow only limited discretion to the carrier in the action they can undertake. (i.e. request that a "covered employee" submit to a drug or alcohol test.) *See Skinner v. Railway Labor Executives, supra*

PRAYER FOR RELIEF

WHEREFORE Respondent, James T. Roddy, preys that this Honorable Court deny Certiorari. Plaintiff further prays that this Honorable Court grant to Respondent such other affirmative relief as this Court deems just, necessary and proper.

Respectfully submitted

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APPENDIX 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE

Case No. 02-8184

JAMES T. RODDY,
Plaintiff,

v.

GRAND TRUNK WESTERN RAILROAD INC., subsidiary of CANADIAN NATIONAL RAILWAY LTD, TRACY MILLER, LAWRENCE T. WIZAUER, DAVID CROMIE, PETER BRANDON, THOMAS WILLETT, LAWRENCE R. MARTENIS, Jointly and Severally,
Defendants.

COMPLAINT

NOW COMES Plaintiff, James T. Roddy, by and through his attorney Douglas A. McKinney and states the following cause of action against the Defendants as follows:

Jurisdiction and Parties

1. This is an action for violation of the Michigan Elliott-Larsen Civil Rights Act, MCLA 37.2101 et seq., MSA 3.548(101) et seq., (hereinafter "The Act") and the common law of the State of Michigan.

2. Plaintiff, James T. Roddy is a resident of the City of Durand, Shiawassee County, State of Michigan.

3. Defendant, Grand Trunk Western Railroad INC. (hereinafter GTW), is a Delaware corporation and is authorized to conduct business in the State of Michigan, and is doing business in the City of Durand, Shiawassee County, State of Michigan.

4. Defendant, TRACY MILLER, upon information and belief for relevant times herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Pontiac, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

5. Defendant, LAWRENCE T. WIZAUER, upon information and belief for relevant times herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

6. Defendant, DAVID CROMIE, upon information and belief for times relevant herein was an employee and/or agent of Defendant GTW carrying out his

employment at least in part in the City of Flint, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

7. Defendant, PETER BRANDON, upon information and belief for relevant time herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

8. Defendant, THOMAS WILLETT, upon information and belief for relevant time herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, the State of Michigan

9. The events hereinafter described, giving rise to this cause of action occurred at least in part in the City of Durand, Shiawassee County, State of Michigan.

10. The amount in controversy exceeds $25,000, exclusive of interest, costs, and attorney fees and this matter is otherwise within the jurisdiction.

Background Facts

11. Plaintiff began his employment with Defendant in 1965, as a Brakeman.

12. Over the years of his employment with Defendant, Plaintiff served in a variety of positions, including Conductor.

13. On or about the afternoon of July 11, 2000, while driving a Motor vehicle on personal business Plaintiff was subjected to a routine traffic stop by the City of Durand Police Department that led to an arrest on Misdemeanor charges including but not limited to Possession of Marijuana.

14. During the course of the arrest the Plaintiff was exposed to a chemical irritants and jailed.

15. Plaintiff's wife notified Defendant GTW, Plaintiff's employer, that Plaintiff was unavailable for work on the night of July 11, 2000.

16. Almost immediately thereafter, upon information and belief, Defendants Cromie, Miller, Wizaurer, Martenis and Willett requested, made or maintained a record of information regarding this misdemeanor arrest or detention of Plaintiff.

17. As a result of the Defendants requesting, making or maintaining of a record or information of this misdemeanor arrest and detention, Defendant, GTW, conducted a formal company investigation on a charge of possession of marijuana which were alleged to be in connection to the terms, conditions, or privileges of Plaintiff's employment

18. Thereafter Defendants attempted to coerce, intimidate, threaten, or interfere with Plaintiff's exercise or enjoyment of a right granted or protected by the

Elliott-Larsen Civil Rights Act MCL § 37.2701 et. seq.

19. Thereafter the Defendant GTW by its own actions and through the actions of their employees and/or agents terminated Plaintiff's employment.

20. When he was terminated, Plaintiff was a Conductor on Train #242/243.

21. Plaintiffs work performance and conduct was always satisfactory or above.

Cause of Action

22. Plaintiff incorporates by reference paragraphs 1 through 21.

23. At all material times, Plaintiff was an employee, and Defendant GTW was his employer, covered by and within the meaning of "The Act", MCLA § 37.2101 et seq., MSA 3.548(101) et seq.

24. MCL § 37.2205 prohibits an employer from requesting, making, or maintaining a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.

25. In this matter regarding the incident of July 11, 2000 the charges were dismissed and no conviction resulted.

26. MCL § 37.2710 prohibits two or more persons from conspiring or any person to engage in acts including but not limited to aiding, abetting, inciting, compelling, or coercing any person to engage in a

violation of "The Act", or to commit an act prohibited by "The Act", and coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment or rights granted or protected by "The Act".

27. Defendant, GTW's decision to terminate the Plaintiff's employment from his position of Conductor was as a direct result of the request for, and subsequent making of or maintaining of a record of information regarding a Misdemeanor arrest or detention that did not result in a conviction.

28. On or about August 4, 2000 and October 12, 2000 Defendants including Defendants Brandon and Miller threatened, coerced and/or ordered, the Plaintiff to release information regarding a Misdemeanor Arrest or Detention or face further disciplinary action in violation of MCL § 37.2205a(1).

29. Defendant, through its agents, representatives, and employees, was predisposed to discriminate against the Plaintiff on the basis of the Defendants' request, the making of, or maintaining of information regarding a misdemeanor arrest, detention and/or disposition where a conviction did not result and/or the Plaintiff's exercise of his rights under "The Act". The Defendants thereafter acted in accordance with that predisposition.

30. Defendants, through its agents, representatives, and employees, treated Plaintiff differently from similarly situated employees in the application of the terms and conditions of employment, based on requesting, making or maintaining a record of information regarding a misdemeanor arrest, detention, or

disposition where a conviction did not result, and/or the exercise of Plaintiff's right not to reveal such information under "The Act".

31. Defendants' actions were intentional and in disregard for Plaintiff's rights under "The Act" with the intent to inflict financial and emotional distress upon the Plaintiff's normal well being.

32. The Defendant GTW is responsible for its own wrongdoing and for the wrongful actions of its employees and/or agents taken within the scope of their employment.

33. As a direct and proximate result of Defendants' unlawful and wrongful actions, Plaintiff has sustained injuries and damages including, but not limited to, loss of earnings in excess of $160,000.00 and earning capacity; loss of career opportunities; humiliation and embarrassment; mental and emotional distress; and loss of the ordinary pleasures of everyday life, including the right to pursue gainful occupation of choice.

PLAINTIFF REQUESTS that this court enter judgment Defendants as follows:

1. Compensatory damages in whatever amount above $25,000 he is found to be entitled;

2. Exemplary damages in whatever amount above $25,000 he is found to be entitled;

3. An award commensurate of approximately two years lost wages and the value of fringe benefits lost,

including but not limited vacation pay, sick and personal days, past and future;

4. An award of interest, costs, and reasonable attorney fees pursuant to MCL §37.2801(3);

5. An order enjoining Defendant, its agents, representatives, and employees from further acts of discrimination or retaliation;

6. An order reinstating Plaintiff to the position he would have held if Defendant had not discriminated;

7. An order directing the Defendant Employer to remove and destroy all files, records, transcripts, notations and any mention of discipline or disciplinary action taken against Plaintiff in this matter; and

8. An order awarding whatever other equitable relief appears appropriate at the time of final judgment.

Respectfully submitted,

/s/ Douglas A. McKinney (P35430)
Attorney for Plaintiff
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(248) 601-1689

JURY DEMAND

NOW COMES Plaintiff, James T. Roddy, by and through his attorney, Douglas A. McKinney and hereby demands that the above entitled matter be tried before a Jury

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

(2)

No. 05-106

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INCORPORATED; TRACEY MILLER; LAURENCE T. WIZAUER; DAVID CROMBIE; PETER BRANDON; THOMAS WILLETT; LAWRENCE R. MARTENIS, PETITIONERS

v.

JAMES T. RODDY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Respondent Does Not Rebut Two of the Petition's Three Reasons to Grant Certiorari and Concedes the Core of the Third. 1

A. Respondent Fails to Address Petitioners' Demonstration that the Decision Below Conflicts with this Court's Precedents and Congressional Intent and is Important to Commerce and Labor Stability. 1

B. Respondent Concedes a Conflict Among the Courts of Appeals on the Important Question of Law Presented. 2

II. Respondent Fails to Rebut Petitioners' Demonstration of the Extent of the Conceded Split 3

III. Further Percolation Is Unlikely To Provide a Better Occasion for Resolving the Conflict 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

ALEXANDER V. GARDNER-DENVER CO., 415 U.S. 36 (1974).5

ANDERSON V. AMERICAN AIRLINES, INC., 2 F.3D 590 (5TH CIR. 1993).....3

BENEFICIAL NATIONAL BANK V. ANDERSON, 539 U.S. 1 (2003).....6, 7, 8

BHD. OF R.R. TRAINMEN V. CHICAGO RIVER & IND. R.R., 353 U.S. 30 (1957).....1

BHD. OF R.R. TRAINMEN V. HOWARD, 343 U.S. 768 (1952)....1

CALIFORNIA V. TAYLOR, 353 U.S. 553 (1957).....1

CIRCUIT CITY STORES V. ADAMS, 532 U.S. 105 (2001).....5

CONSOLIDATED RAIL CORP. V. RAILWAY LABOR EXECUTIVES' ASS'N, 491 U.S. 299 (1989).....1

DAVIS V. INT'L UNION, UAW, NO. 05-107, (FILED JULY 15, 2005) 2

DEFORD V. SOO LINE R.R., 867 F.2D 1080 (8TH CIR. 1989)....6

FRANCHISE TAX BD. V. CONSTR. LABORERS VACATION TRUST, 463 U.S. 1 (1983).....7

GEDDES V. AM. AIRLINES, INC., 321 F.3D 1349 (11TH CIR. 2003) 6

GIBBONS V. OGDEN, 22 U.S. (9 WHEAT.) 1 (1824) 5

GORE V. TRANS WORLD AIRLINES, 210 F.3D 944 (8TH CIR. 2000) 6

GRABLE & SONS METAL PRODS., INC. V. DARUE ENG'G & MFG., NO. 04-603 (DECIDED JUNE 13, 2005) 3

GRAHAM CTY. SOIL & WATER CONSERVATION DIST. V. U.S. EX REL. WILSON, NO. 04-169 (DECIDED APRIL 20, 2005) 3

HAWAIIAN AIRLINES, INC. V. NORRIS, 512 U.S. 246 (1994) .. 4

INTERNATIONAL ASS'N OF MACHINISTS V. CENTRAL AIRLINES, INC., 372 U.S. 682 (1963) 1

O'BRIEN V. CONSOL. RAIL CORP., 972 F.2D 1 (1ST CIR. 1992) 5

PITTSBURGH & LAKE ERIE RAILROAD. V. RAILWAY.LABOR EXECUTIVES' ASS'N, 491 U.S. 490 (1989) 1

RIVET V. REGIONS BANK, 522 U.S. 470 (1998) 7

ROBINSON V. NORTHWEST, INC., 2004 WL 1941277, *4 (D. MINN. AUG. 30, 2004) 6

RY. LABOR EXECS. ASS'N V. PITTSBURGH & LAKE ERIE RY., 858 F.2D 936 (3D CIR. 1988) 6, 7

SHAFII V. BRITISH AIRWAYS, PLC, 83 F.3D 566 (2D CIR. 1996) 3, 4

SPECTOR V. NORWEGIAN CRUISE LINES LTD., NO. 03-1388 (DECIDED JUNE 6, 2005) 3

WISCONSIN PUB. INTERVENOR V. MORTIER, 501 U.S. 597 (1991) 5

STATUTES

28 U.S.C. § 1447 8

29 U.S.C. §§ 481-83 5

OTHER AUTHORITIES

FEDERAL QUESTION JURISDICTION, 37 LOY. L.A. L. REV. 1443, 1489 N.250 (2004) 7

REPLY BRIEF FOR THE PETITIONERS

I. Respondent Does Not Rebut Two of the Petition's Three Reasons to Grant Certiorari and Concedes the Core of the Third.

A. Respondent Fails to Address Petitioners' Demonstration that the Decision Below Conflicts with this Court's Precedents and Congressional Intent and is Important to Commerce and Labor Stability.

Petitioners demonstrated that the Sixth Circuit's reasoning in the decision below conflicts with this Court's precedents. *See* Pet. 20-27. Respondent does not address (much less contradict) Petitioners' demonstration that the Sixth Circuit lost sight of this Court's prior rulings that "'the District Court has jurisdiction' . . . to enforce compliance with the requirements of [Section 3 of] the Railway Labor Act," *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 42 (1957) (quoting *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). *See* Pet. 21-23.[1] Respondent also fails to address Petitioners' showing that the Sixth Circuit's ruling conflicts with this Court's precedents holding that the preemptive force of the

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[1] Respondent offers no answer to *Chicago River* and *Howard*, nor to the Petition's discussion of, as further examples of federal question jurisdiction, *California v. Taylor*, 353 U.S. 553 (1957), *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), *Pittsburgh & Lake Erie Railroad. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989), and *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Still further examples of federal jurisdiction are discussed by amici at page 6 of their brief.

RLA[2] is no less than that of Section 301 of the LMRA, which has such "complete" preemptive force as to provide federal jurisdiction supporting removal. *See* Pet. 24-27.

Respondent also does not dispute Petitioners' demonstration (at 27-30) that the Sixth Circuit's decision is contrary to Congress's intent to make the federal courts available to enforce the RLA dispute resolution process. Nor does he deny that the question presented is important to both interstate commerce and labor stability in the air and rail industries, a point underscored by the amicus brief of three transportation organizations.

B. Respondent Concedes a Conflict Among the Courts of Appeals on the Important Question of Law Presented.

As for Petitioners' additional basis for certiorari – a six-to-three split among the circuits on the question presented, *see* Pet. 13-20 – Respondent concedes the core of Petitioners' demonstration. He acknowledges "real conflicts among the Circuits," Opp. 22, as to whether "state law claims that constitute minor disputes are completely preempted by the RLA, [and] thus cannot be remanded to state court," Opp. 21 (quotation omitted).[3]

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[2] This Reply uses the same abbreviations as in the Petition.

[3] Another petition for certiorari to the Sixth Circuit also notes this circuit split, albeit only in part (omitting discussion of the positions of the Second, Fourth, and Seventh Circuits, *see* Pet. 15-18, misattributing the Fifth Circuit's *Anderson* opinion to the Eighth Circuit, *see id.* at 17, and inaccurately reporting the position of the Ninth Circuit, *see id.* at 16-17 & n.9). *See Davis v. Int'l Union, UAW*, No. 05-107, Petition, at 23-24 (filed July 15, 2005; this Court

In light of this concession, it is of no moment that Respondent attempts to minimize the extent of the conceded conflict as only three-to-two: This Court often grants review to resolve splits where even fewer than five circuits are divided. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, No. 04-603 (decided June 13, 2005) (two-to-one split); *Spector v. Norwegian Cruise Lines Ltd.*, No. 03-1388 (decided June 6, 2005) (one-to-one split); *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 04-169 (decided April 20, 2005) (two-to-one split). In any event, as we now discuss, Respondent's attempt fails.

II. Respondent Fails to Rebut Petitioners' Demonstration of the Extent of the Conceded Split.

Respondent cannot explain away the decisions of the Fifth and Second Circuits, in *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993), and *Shafii v. British Airways, PLC*, 83 F.3d 566 (2d Cir. 1996), both of which state that removal is proper when the RLA preempts a state law claim asserted in state court. *See* Pet. 17-18. Each decision has been correctly regarded by lower courts as articulating the law of the respective

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called for a response on August 18, 2005). However, notwithstanding the common theme of confusion in the courts of appeals as to the scope of the complete preemption approach, *Davis* involves different issues of statutory interpretation under a different federal statute, the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 481-483 (2004) as well as issues of appellate jurisdiction that have no parallel in this case. Accordingly, Petitioners respectfully suggest that the Court should grant certiorari in this case whether or not it does so in Davis.

circuit on the question presented, even though the courts of appeals found that the particular state claims asserted in the cases before them were not preempted by the RLA and therefore were not removable. Thus, in the decision below, the Sixth Circuit cited *Anderson* in acknowledging that "[n]ot all of the circuits are in agreement" with its determination. Pet. App. 10a-11a. And Respondent does not attempt to rebut Petitioners' demonstration that district courts within the Second Circuit have applied *Shafii* to deny remand of removed state claims that the RLA does preempt. *See* Pet. 18 n.11.

Respondent also cannot explain away the determinations of the Fourth and Seventh Circuits that the RLA provides federal jurisdiction to support removal of a minor dispute. *See* Pet. 15-16. He suggests (at Opp. 20-21) that the exact nature of the state law that the RLA is preempting will control the answer to the question presented. That suggestion is erroneous.

The issue presented by the Sixth Circuit's decision is one of federal jurisdiction, *i.e.*, whether Congress intended federal courts to have federal question jurisdiction with respect to an RLA minor dispute. How and under what state laws a plaintiff may plead a claim that constitutes a minor dispute is irrelevant to that question. The nature of the state claim may be relevant to a different analysis – whether, under *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), the dispute is in fact a minor dispute – but even then, it is the substance of the claim and its relation to the collective bargaining agreement that matters, not (as Respondent repeatedly suggests, *see* Opp. 21, 27, 28-29) its labeling as a "civil rights" claim.

It has thus been held that a state civil rights claim may indeed be preempted by the RLA. *See, e.g., O'Brien v. Consol. Rail Corp.*, 972 F.2d 1, 1 (1st Cir. 1992) (holding that a "state law providing for physical handicap discrimination claims against employers is preempted by the Railway Labor Act"). That is because, under the Supremacy Clause, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

Because federal preemption of ***state*** law is at issue, Respondent's discussion of the ***federal*** civil rights law contained in Title VII is inapposite. *See* Opp. 28-29 (discussing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).[4] Respondent can offer no reason why it matters that the Fourth and Seventh Circuit decisions did not involve state civil rights acts. Respondent concedes that the Eighth and Ninth Circuit cases cited in the Petition (*see* Pet. 16-17) present "real conflicts among the Circuits." Opp. 22. Those cases also did not involve claims crafted as arising under state civil rights acts.

III. Further Percolation Is Unlikely To Provide a Better Occasion for Resolving the Conflict.

Petitioners demonstrated that the split in the circuits is deeply entrenched and will likely persist until

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[4] Contrary to Respondent's suggestion, federal law may subject state law discrimination claims to arbitration. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (Federal Arbitration Act requires enforcement of agreement to arbitrate non-RLA employee's state law employment discrimination claim).

resolved by this Court. *See* Pet. 19-20. Respondent's Opposition does not demonstrate otherwise.

The Opposition provides no reasoning whatsoever in support of Respondent's assertion that this Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), undercuts the cases on the majority side of the split. Contrary to Respondent's suggestion (Opp. 22), *Beneficial* has not been read to undermine the Eighth Circuit's majority reasoning that the RLA "'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements." *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1085 (8th Cir. 1989). After *Beneficial*, *Deford* continues to be followed within the Eighth Circuit. *See, e.g., Robinson v. Northwest Airlines, Inc.*, 2004 WL 1941277, *4 (D. Minn. Aug. 30, 2004) ("[U]nder the complete preemption doctrine, the RLA preempts state law claims that require an interpretation of, or involve rights and duties created or defined by, collective bargaining agreements." (citing *Beneficial*, *Deford*, and *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000))).

Further negating Respondent's contention, commentary has suggested that *Beneficial* undercuts the minority position barring removal, as Petitioners discussed. *See* Pet. 26 n.10. The Eleventh Circuit (which the Sixth Circuit has now followed) included as a basis of its remand determination the premise that there was "no evidence of congressional intent to make RLA claims removable," *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1354 (11th Cir. 2003), following the Third Circuit's finding that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiff's exclusive reliance on state law,"

Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie Ry., 858 F.2d 936, 942-43 (3d Cir. 1988). Subsequently, however, this Court in *Beneficial* reversed the Eleventh Circuit when it relied upon the same premise in a case that considered federal jurisdiction supporting removal under a different federal statute. This Court held that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." *Beneficial*, 539 U.S. at 9 n.5.

Beneficial's clarifying holding has thus been siad to have raised the question whether the circuits on which Respondent and the Sixth Circuit rely "would not hold to [their] dissenting position in the future." Note, *Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443, 1489 n.250 (2004) (cited in Pet. at 26 n.10).[5] Respondent cites no contrary authority or commentary.

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[5] *Beneficial* also demonstrates that Respondent's reliance on *Rivet v. Regions Bank*, 522 U.S. 470 (1998), is misplaced. *See* Opp. 24. According to *Rivet*:

> Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.

522 U.S. at 475 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983)). *Beneficial* thus acknowledged both the determination in *Rivet* that there is no federal question jurisdiction to determine the preclusive effect of a prior federal judgment and the existence of certain exceptions to the well-pleaded complaint rule, including when, as here, "a federal

In these circumstances, Respondent's suggestion that the Court should abdicate resolution of the question presented to the courts of appeals is particularly unsound. If certiorari is denied, plaintiffs opposing removal would continue to have the opportunity to relitigate the question presented within the circuits that allow removal. Defendants seeking removal, in contrast, likely will continue to be precluded by operation of 28 U.S.C. § 1447(d) from appealing the remands now required by circuit precedent based on a premise that *Beneficial* has now held is incorrect. There is thus little prospect for these courts of appeals to reconsider their positions. The Petition demonstrated these unique jurisdictional obstacles to further percolation of the question presented, *see* Pet. 19-20, but Respondent has failed to address the consequent need for this Court's prompt review.

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statute wholly displaces the state-law cause of action through complete pre-emption." 539 U.S. at 6-8.

CONCLUSION

The petition for a writ of certiorari should be granted.

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August 31, 2005

(4)

FILED
SEP 21 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-106

IN THE

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GRAND TRUNK WESTERN RAILROAD INC., *et al.*,
Petitioners,

v.

JAMES T. RODDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, Petitioners submit this supplemental brief to inform the Court that a panel of the United States Court of Appeals for the Second Circuit has issued an opinion that addresses the question presented in the Petition. *Sullivan v. Am. Airlines, Inc.*, 2005 WL 2210337 (Sept. 13, 2005), App. 18a (holding that "there is no complete preemption under the RLA," and thereby "align[ing] ourselves on one side of a circuit split").[1]

[1] The *Sullivan* decision will not become final until after the Court's September 26 conference. *See* Fed. R. App. P. 41(b) (mandate does not issue until time for petition for rehearing expires). Petitioners are promptly notifying the Court, however, to discharge their obligation to call such developments "to the attention of the Court *without delay*." *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (emphasis in original).

Sullivan acknowledges that the Second Circuit had previously held that, "where a complaint raises state-law claims that are 'in fact preempted by the RLA, the action may properly be removed to the federal courts, even when the plaintiff's complaint does not itself include a federal cause of action.'" App. 12a (quoting *Shafii v. British Airways, PLC,* 83 F.3d 566, 569 (2d Cir. 1996)); *see also* Pet. 17-18 (discussing *Shafii*). The *Sullivan* panel rejected that holding and instead held that, "even if state-law claims qualify as minor disputes under the RLA, the RLA does not completely preempt those claims and therefore does not provide federal courts with original jurisdiction over them." App. 2a.[2]

Consistent with Petitioners' demonstrations, Pet. 13-19; Reply 2-3, the *Sullivan* opinion expressly recognizes the existence of a deep split among the courts of appeals on the question presented. App. 18a & n.9. If the *Sullivan* decision becomes final as is, it would change the six-to-three circuit split described by the Petition, Pet. 13-20, into a five-to-four split.

The *Sullivan* panel based its decision not to follow prior Second Circuit precedent on its view that this Court's decision in *Beneficial National Bank v. Anderson,* 539 U.S. 1 (2003), "'casts doubt'" on authorities on the majority side of the split. App. 12a (citation omitted). However, as Petitioners have argued (Reply at 6-7), *Beneficial* should instead be read as casting doubt on the determinations of the minority circuits, in light of its holding that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." *Beneficial*, 539 U.S. at 9 n.5. The *Sullivan* panel's questionable reading of *Beneficial* thus adds to the controversy exhibited in the earlier

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[2] The panel had raised the issue of complete preemption under the RLA *sua sponte*, after the parties had briefed the case on the jointly-held understanding that the RLA does give rise to federal question jurisdiction over minor disputes. *See* App. 6a n.3, 11a.

briefing regarding the implications, if any, of *Beneficial* for the question presented under the RLA. *Compare* Pet. 25-26 & nn. 15, 16, *and* Reply 6-7, *with* Opp. 22-24, 27.

The *Sullivan* panel also recognized that "a federal statute with completely preemptive force also gives rise to original federal jurisdiction, and as a consequence allows removal under 28 U.S.C. § 1441." App. 15a. However, it neglected this Court's RLA precedents upholding federal question jurisdiction (discussed in the Petition at pages 21 to 23) when it determined that Section 3 of the RLA does not give rise to original federal jurisdiction.

If *Sullivan* becomes final as is, it would further compromise what Congress intended to be a uniform federal law of labor relations governing the Nation's interstate air and rail transportation infrastructure. A great deal of interstate commerce is transported through the states of the Second Circuit. *Sullivan* would add significantly to the scope of commerce affected if more state courts were allowed to render potentially inconsistent interpretations of the RLA and of the collective bargaining agreements that it governs. *Cf.* Amicus Br. of Airline Industrial Relations Conference *et al.*, at 7-8.

For the foregoing reasons and for the reasons set forth in the Petition and in Petitioners' Reply Brief, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 04-0325-CV

JOHN SULLIVAN, JOHN KENNEDY, DAVID VIRELLA,
and VINCENT ARGENTINA,
Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., STAN ROBERTS,
EDWIN P. ARGONZA, II, MICHAEL A. CHIOFALO,
ALBERT GIL, and PETER A. PEREZ,
Defendants-Appellees.

Argued Sept. 28, 2004
Decided Sept. 13, 2005

Before: WALKER, *Chief Judge*, LEVAL and KATZMANN, *Circuit Judges*.

JOHN M. WALKER, *Chief Judge*.

The plaintiffs in this case, union members and employees of American Airlines, were mostly on the losing side of a hard-fought union election. They blame the loss, at least in part, on American, which suspended them during the campaign and then fired them for allegedly posting racist campaign fliers. Although American later reinstated them, the plaintiffs also want their names cleared of the taint of racism flowing from American's conclusion that they posted racist fliers. The plaintiffs also object to campaign fliers posted by their opponents in the election. To clear their names and

recover for their loss of reputation, the plaintiffs filed a state-law defamation suit in New York state court against American, two of its managers, and three union members who ran against them.

American removed the case to federal court, arguing that (1) because the plaintiffs' state-law defamation claims were so-called minor disputes under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, the district court had jurisdiction over the claims, and (2) because the RLA preempts state-law claims that are minor disputes, the claims should be dismissed. The district court (Carol Bagley Amon, *Judge*) agreed in part, dismissing one count of the complaint as preempted and remanding the other two counts to state court.

Unlike the district court, we do not reach the question whether the plaintiffs' state-law claims are the type of so-called minor disputes that, under the RLA, are within the exclusive primary jurisdiction of arbitral panels established pursuant to the RLA. Instead, we hold that even if state-law claims qualify as minor disputes under the RLA, the RLA does not completely preempt those claims and therefore does not provide federal courts with original jurisdiction over them. The district court therefore lacked subject-matter jurisdiction over this case. Accordingly, we vacate the district court's judgment and remand with instructions that the case be remanded to state court.

I. BACKGROUND

In the spring of 2002, plaintiffs John Sullivan, David Virella, and Vincent Argentina, American Airlines employees, ran for reelection to their positions as officers of Air Transport Local 501 of the Transport Workers Union of America. Defendants and fellow employees Michael Chiofalo, Albert Gil, and Peter Perez ran on an opposing slate.

According to the plaintiffs, during the campaign, the defendants posted in the workplace fliers disparaging Sullivan, Virella, and Argentina.[1]

Meanwhile, someone posted a flier accusing defendant Gil of having lied about his ethnicity. American Airlines has strict rules about racial harassment in the workplace, and defendants Stan Roberts and Edwin Argonza, managers at American, investigated the posting of this flier. In the course of the investigation, American suspended with pay plaintiffs Sullivan, Virella, Argentina, and John Kennedy (a fellow employee but not a candidate). Voting in the union elections took place while the plaintiffs were suspended; Sullivan and Virella lost their elections.

As a result of its investigation, American concluded (wrongly, according to the plaintiffs) that the plaintiffs had posted the flier about Gil. American fired all four plaintiffs and issued notices of termination, termed "final advisories," that included statements accusing them of having posted the flier. But after the plaintiffs lodged a grievance with the union protesting their termination, American backed down. American reinstated them, but it recast the "final advisories" (termination notices) as "second advisories" (warnings) that reiterated American's finding that the plaintiffs had posted the flier about Gil.

Not satisfied with just returning to work, the plaintiffs filed suit in New York state court alleging three counts of defamation. Count 1 accused opposing candidates Chiofalo, Gil,

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[1] The fliers included the following statements and others like them: "Jack Sullivan, Secretary Treasurer of Local 501, guilty of discrimination by the U.S. government against its members"; "Guilty as charged! . . . The Dave Virella administration has been found guilty of discriminating against its own members by the Equal Employment Opportunity Commission. . . . Guilty of unlawful employment practices against its own members." The "Dave Virella administration" allegedly referred to the plaintiffs collectively.

and Perez of defaming plaintiffs Sullivan, Virella, and Argentina under state law by posting "libelous" fliers about the plaintiffs; Count 1 also alleged that American was liable for the defamation because it allowed the fliers to remain on a company bulletin board. Count 2 accused American and its managers Roberts and Argonza of defaming all four plaintiffs by, inter alia, issuing the "final advisories" that asserted that the plaintiffs had posted the flier about Gil. Count 3 accused Chiofalo alone of defaming all four plaintiffs by asserting, at a union meeting, that the plaintiffs had posted the flier about Gil.

American responded by removing the case to federal court on the basis that Counts 1 and 2 asserted claims governed by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-52, 154-88 (the airline-relevant provisions). The RLA gives primary jurisdiction over disputes between airlines and their employees that "grow[ ] out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" to "board[s] of adjustment" (arbitral panels) established under the RLA. *See* 45 U.S.C. § 184; *see also id.* § 153 (First) (i) (governing railroads);[2] *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Such disputes are known as "minor disputes" under the RLA, as distinguished from "major disputes," which involve the formation of collective-bargaining agreements (CBAs) and are governed by different provisions of the RLA. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-03, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (explaining the difference between minor and major disputes). The major-dispute provisions of the RLA are not relevant to this case.

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[2] Section 153 (First) (q) also provides for limited federal-court review of the adjustment boards' decisions.

On its face, the plaintiffs' complaint raises only state-law defamation claims. The Supreme Court has explained, however, that "where the resolution of a state-law claim depends on an interpretation of [a collective-bargaining agreement], the claim is preempted" by the RLA and must be brought before one of the arbitral panels established pursuant to the RLA. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 261, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). American argued before the district court that because resolution of the state-law defamation claims against it (Counts 1 and 2 of the complaint) would require the district court to interpret the collective-bargaining agreement, the claims were preempted and could not be heard in state or federal court.

As to Count 1, the district court disagreed. It found that the state-law defamation claim based on American's alleged endorsement of defamatory fliers posted by Chiofalo, Gil, and Perez could be evaluated without reference to the CBA and thus was not preempted by the RLA. As to Count 2, however, the district court agreed with American that resolving it would require interpreting the CBA and that it was preempted. It is from the dismissal of Count 2 alone that the plaintiffs appeal to this court.

II. DISCUSSION

Because the district court dismissed Count 2 on the pleadings, we review the district court's decision de novo, taking the allegations in the complaint as true and making all reasonable inferences in the plaintiffs' favor. *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir.2004) (per curiam). The plaintiffs raised only state-law claims in their complaint, and the district court understandably, though mistakenly, accepted the premise of American's notice of removal that if the state-law claims in Counts 1 and 2 were preempted by the RLA, the district court had subject-matter jurisdiction over the case

to decide the preemption question.[3] That premise, though it found some support in our case law when the district court made its ruling, was mistaken. To understand why, we must examine the law of federal preemption in general and RLA preemption in particular as well as the difference between "complete" preemption, which can be the basis for federal subject-matter jurisdiction, and "ordinary" preemption, which cannot.

A. Preemption and federal subject-matter jurisdiction

Federal courts are courts of limited jurisdiction. U.S. Const. art. III, § 2, cl. 1. American removed this case to federal court under 28 U.S.C. § 1441, which permits removal only of actions over which "the district courts of the United States have original jurisdiction . . . ." *Id.* § 1441(a); *see also id.* § 1441(b). If it exists at all, original jurisdiction in this case can be based solely on federal-question jurisdiction under 28 U.S.C. § 1331, which gives federal district courts jurisdiction over suits "arising under the Constitution, laws, or treaties of the United States." The district court assumed (as did the parties) that if Count 2 was preempted by the RLA, a federal statute, Count 2 therefore arose under federal law.

The plaintiffs, however, raised only state-law claims in their state-court complaint. As a general rule, a suit seeking recovery under state law is not transformed into a suit "arising under" federal law merely because, to resolve it, the court may need to interpret federal law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 115, 57 S.Ct. 96, 81 L.Ed. 70 (1936) ("Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."). This

[3] We raised sua sponte the question whether RLA preemption, even if found, could be a proper basis for federal subject-matter jurisdiction. The parties did not contest this issue below or on appeal, and the district court did not address it.

principle underlies the well-pleaded-complaint rule, which dictates that federal subject-matter jurisdiction can be founded only on those allegations in a complaint that are "well pleaded." *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). The well-pleaded-complaint rule mandates that in assessing subject-matter jurisdiction, a federal court must disregard allegations that a well-pleaded complaint would not include—e.g., allegations about anticipated defenses. *Rivet*, 522 U.S. at 475 ("A defense is not part of a plaintiff's properly pleaded statement of his or her claim."). Thus, a plaintiff may not create federal subject-matter jurisdiction by alleging in his complaint that the defendant's (anticipated) federal defense should fail. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

While the well-pleaded-complaint rule directs federal courts to disregard certain elements of a complaint in assessing federal subject-matter jurisdiction, federal courts sometimes do the inverse: read into a complaint elements that the plaintiff omitted. The artful-pleading doctrine, a corollary to the well-pleaded-complaint rule, rests on the principle that a plaintiff may not defeat federal subject-matter jurisdiction by "artfully pleading" his complaint as if it arises under state law where the plaintiff's suit is, in essence, based on federal law. *See Rivet,* 522 U.S. at 475-76; *see also Franchise Tax Bd.*, 463 U.S. at 22 ("[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."); *cf. Marcus v. AT & T Corp.*, 138 F.3d 46, 53-54 (2d Cir.1998). Faced with such an artfully (i.e., misleadingly) pleaded complaint, the federal court may construe the complaint as if it raised the federal claim that actually underlies the plaintiff's suit. *Rivet*, 522 U .S. at 475.

The artful-pleading doctrine includes within it the doctrine of complete preemption.[4] *Id.* ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."). Under the complete-preemption doctrine, certain federal statutes are construed to have such "extraordinary" preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims—i.e., completely preempted. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). When a plaintiff raises such a completely preempted state-law claim in his complaint, a court is obligated to construe the complaint as raising a federal claim and therefore "arising under" federal law.[5] The Supreme Court has only found three statutes to

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[4] The precise scope of the artful-pleading doctrine is not entirely clear. *See generally* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L.Rev. 1781 (1998). In this circuit, the artful-pleading doctrine has been relied upon to support federal-court jurisdiction where complete preemption did not apply, but where a plaintiff's state-law contract claims were construed as asserting rights arising only under federal tariffs. *See Marcus*, 138 F.3d at 55-56. The Eighth Circuit, by contrast, has said that the artful-pleading and complete-preemption doctrines are coextensive and that a federal court may therefore construe a plaintiff's state-law suit as raising a federal claim only where that claim arises under a completely preemptive statute. *See M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir.1991). Because we address in this opinion only complete preemption, which the Supreme Court in *Rivet* described as falling within the artful-pleading doctrine, 522 U.S. at 475, we need not try to trace the artful-pleading doctrine's outer boundaries.

[5] Because complete preemption operates to create federal subject-matter jurisdiction, some commentators have argued that the doctrine would be better labeled "jurisdictional" preemption. *See* 15 James Wm. Moore et al., Moore's Federal Practice § 103.45[1] (3d ed.2005); *see also Lister v. Stark*, 890 F.2d 941, 943 n. 1 (7th Cir.1989) ("The use of the term 'complete preemption' is unfortunate, since the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine."). We agree that the term "jurisdictional preemption" is more

have the requisite extraordinary preemptive force to support complete preemption: § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 558-62, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); § 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a), *see Metro. Life*, 481 U.S. at 65-66; and §§ 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85-86, *see Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7-11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).[6]

The complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption. *See, e.g.*, 16 James Wm. Moore et al., Moore's Federal Practice § 107.14[4][b][i]-[iii] (3d ed.2005) (discussing types of preemption). Many federal statutes—far more than support complete preemption—will support a defendant's argument that because federal law preempts state law, the defendant cannot be held liable under state law. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. ___, 125 S.Ct. 1788, 1803, 161 L.Ed.2d 687 (2005) (explaining that 7 U.S.C. § 136v(b), a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), preempts certain conflicting state laws and rules); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-30, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (discussing what type of state-law claims are preempted by various federal statutes related to cigarettes); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir.2005) (holding that the Interstate Commerce Commission Termination Act of 1995,

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accurate, but follow convention (and the Supreme Court) in continuing to use the label "complete preemption."

[6] The Supreme Court has also held in *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), that certain claims related to Indian tribal lands are completely preempted, but the preemption analysis in that case cannot be generalized to cases not involving Indian tribes. *See Beneficial Nat'l Bank*, 539 U.S. at 8 n. 4.

49 U.S.C. § 10101 *et seq.*, preempts a Vermont law as applied to certain railroads). Ordinary defensive preemption comes in three familiar forms: express preemption, conflict preemption, and field preemption.[7] *See Cipollone*, 505 U.S. at 516; *Green Mountain R.R. Corp.*, 404 F.3d at 641. The Supreme Court has left no doubt, however, that a plaintiff's suit does not arise under federal law simply because the defendant may raise the defense of ordinary preemption. *See Caterpillar*, 482 U.S. at 393 ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."); *Franchise Tax Bd.*, 463 U.S. at 14.

B. Preemption under the RLA

Ordinary preemption is plainly a viable defense under the RLA: pursuant to 45 U.S.C. §§ 153 (governing railroads) and 184 (governing airlines), minor disputes must be heard in the first instance before arbitral panels, not courts, and state-law

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[7] Some commentators seem to equate the defense of field preemption, which defeats a plaintiff's state-law claim because federal law "occupies the field" within which the state-law claim falls, with the doctrine of complete preemption, which creates federal subject-matter jurisdiction over preempted state-law claims. *See* 15 Moore's Federal Practice § 103.45[2] ("[I]n complete preemption cases, federal law *so occupies the field* that any complaint alleging facts that come within the statute's scope necessarily 'arise under' federal law, even if the plaintiff pleads a state law claim only." (emphasis added)). But no Supreme Court case has ever held the two forms of preemption to be equivalent. It is true that the defense of field preemption and the doctrine of complete preemption both rest on the breadth, in some crude sense, of a federal statute's preemptive force. The two types of preemption are, however, better considered distinct. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L.Rev. 685, 747 (1991) ("Another pathology attending field preemption lies in some courts' confusion of field preemption with the complete preemption doctrine.").

claims that are disguised minor disputes are therefore pre-empted by the RLA. *See, e.g., Hawaiian Airlines*, 512 U.S. at 253 ("[A] determination that respondent's complaints constitute a minor dispute would pre-empt his state-law actions."). Further, the Court in *Hawaiian Airlines* established that the test for finding ordinary preemption under the RLA is the same as the test under § 301 of the LMRA. *Hawaiian Airlines*, 512 U.S. at 262-63 (holding that *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), an LMRA case, "provides an appropriate framework for addressing pre-emption under the RLA" and "adopt[ing] the *Lingle* standard to resolve claims of RLA pre-emption").

The key question, however, is whether the analogy drawn by the Court between RLA and LMRA preemption as to *ordinary* preemption also extends to *complete* preemption. *Hawaiian Airlines* came to the Supreme Court from the Hawaii Supreme Court, not from the lower federal courts, *id.* at 251, so the Court had no occasion to consider whether the RLA, as does § 301 of the LMRA, supports federal subject-matter jurisdiction by completely preempting state-law claims within its scope. The district court in this case assumed that the RLA supports complete preemption of minor disputes and therefore focused on determining whether the plaintiffs' state-law defamation claims were such disputes, which are subject to ordinary preemption and can only be heard initially before RLA-mandated arbitral panels. In their briefs before this court the parties take a similar approach, assuming that the RLA supports complete preemption and fighting over whether the complaint in this case meets the standards for RLA/LMRA ordinary preemption outlined in *Hawaiian Airlines*.

Because complete preemption may be crucial to the existence of federal subject-matter jurisdiction, we cannot rely on the parties' assumptions about complete preemption under the RLA. We have an independent obligation to en-

sure that federal subject-matter jurisdiction exists, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), which requires us to consider whether the RLA actually supports complete preemption-- the only possible basis for subject-matter jurisdiction in this case. At oral argument we asked the parties whether *Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1354-57 (11th Cir. 2003), which held that there was no complete preemption under the RLA, affected their arguments in this case, and we directed the parties to brief the question.

American argues that complete preemption under the RLA is not an open question in this circuit and directs our attention to *Shafii v. British Airways, PLC*, 83 F.3d 566 (2d Cir.1996). A panel of this court in *Shafii* stated that where a complaint raises state-law claims that are "in fact preempted by the RLA, the action may properly be removed to the federal courts, even when the plaintiff's complaint does not itself include a federal cause of action." *Id.* at 569. This circuit's prior-panel rule directs us generally to follow the decisions of prior panels until they are overruled either by this court sitting en banc or by the Supreme Court. *Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir.2004). A subsequent panel may, however, reconsider a prior panel's holding that would otherwise be binding precedent not only when it has been directly overruled, but also "where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent." *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir.2003).

It appears that the panel in *Shafii* assumed that *Hawaiian Airlines* was a complete-preemption case and that the analogy between LMRA and RLA preemption established by that case was total. Because the Court's more recent decision in *Beneficial National Bank*, the Court's latest complete-preemption

opinion, entirely undermines this assumption about the RLA, we must reconsider *Shafii's* conclusions about RLA preemption without hearing this case en banc.

The conflation of ordinary and complete preemption under the RLA reflected in *Shafii's* reading of *Hawaiian Airlines,* and in the briefs of the parties in this case, is unsurprising, for under § 301 of the LMRA, establishing ordinary preemption also establishes removability. *See* 29 U.S.C. § 185(c) (expressly giving federal courts original jurisdiction over suits under the LMRA). In other words, in any particular LMRA case, the defensive and complete-preemption inquiries collapse into one. But the higher-order inquiry into whether the RLA or the LMRA is completely preemptive is different, and requires looking at the federal statute rather than a particular state-law claim. *See* 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction § 3722.1 (3d ed.1998) (describing the difference between complete and ordinary preemption as "a difference in kind").

As the Court explained in *Franchise Tax Board*, 463 U.S. at 23, the Court's earlier holding in *Avco* that state-law claims preempted by § 301 of the LMRA arise under federal law and are thus removable to federal court depended upon the "powerful" preemptive force of the LMRA itself. Once *Avco* established that the preemptive force of § 301 of the LMRA dictates that state-law claims within the statute's scope arise under federal law and are removable to federal court, subsequent courts have been obligated only to look at particular state-law claims to determine whether § 301, which provides for original federal jurisdiction of LMRA claims, comprehends those state-law claims. That is, once we know that a federal statute supports complete preemption, providing original jurisdiction in the federal courts over claims arising under the federal statute, in any particular case the complete- and ordinary-preemption inquiries merge. Thus when the

Court in *Hawaiian Airlines* analogized ordinary RLA preemption to ordinary LMRA preemption, it was natural for the *Shafii* court to assume that the analogy went even further—if the analogy were total, then because establishing ordinary preemption under the LMRA also establishes removability (because § 301 supports complete preemption), so too would establishing ordinary preemption under the RLA establish removability.

We now know, however, that the analogy between RLA and LMRA preemption in *Hawaiian Airlines* was never meant to go so far. In *Beneficial National Bank*, the Court clarified that it had found complete preemption only under the LMRA and ERISA, not under the RLA. The Court noted, "In the *two categories* of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial National Bank*, 539 U.S. at 8 (footnote omitted; emphasis added). Had *Hawaiian Airlines* established that § 184 of the RLA, like § 301 of the LMRA, completely preempted state-law causes of action within its scope, the Court in *Beneficial National Bank* would have discussed three, not two, categories of cases involving complete pre-emption. Despite our decision in *Shafii*, in light of *Beneficial National Bank* we must reconsider the question of complete preemption under the RLA.

In *Beneficial National Bank*, the Court held that sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85-86, "provide the exclusive cause of action" for usury claims against national banks and therefore completely preempt analogous state-law usury claims. 539 U.S. at 11. Sections 85 and 86 therefore have "the requisite pre-emptive force to provide removal jurisdiction." *Id.* In the course of bringing the list of completely preemptive federal statutes to three—the LMRA,

ERISA, and now the National Bank Act—*Beneficial National Bank* explained that to determine whether a federal statute completely preempts a state-law claim within its ambit, we must ask whether the federal statute provides "the exclusive cause of action" for the asserted state-law claim. *Id.* at 9. If so, the asserted state-law claim "is in reality based on federal law . . . [and] is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that 'arises under' federal law to be removed to federal court." *Id.* at 8. This language from *Beneficial National Bank* makes clear an aspect of the complete-preemption doctrine that is often overlooked: removal of state-law claims based on complete preemption becomes possible not solely by virtue of the preemptive force of a substantive federal statute such as the LMRA, ERISA, or the National Bank Act, but rather because a federal statute with completely preemptive force also gives rise to original federal jurisdiction, and as a consequence allows removal under 28 U.S.C. § 1441.

Once we recognize that a state-law-based RLA minor dispute cannot be brought within the original jurisdiction of the federal courts and is thus not removable under § 1441, it becomes clear that the RLA does not completely preempt state-law claims that come within its scope. By its terms, § 1441 allows removal only of suits "of which the district courts of the United States have original jurisdiction . . . ." 28 U.S.C. § 1441(a); *see also id.* § 1441(b). Put another way, "[o]nly state-court actions that *originally could have been filed in federal court* may be removed to federal court by the defendant." *Caterpillar*, 482 U.S. at 392 (emphasis added).

Minor disputes under the RLA cannot be filed in the first instance in federal court; they are therefore not removable to federal court. Instead, primary jurisdiction over minor disputes under the RLA—the type of claim American asserts that Sullivan has raised—exists solely in the adjustment boards established pursuant to 45 U.S.C. § 153 (for railroads)

or § 184 (for airlines). *See Consol. Rail Corp.*, 491 U.S. at 304 ("The Board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes."); *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139, 141 (2d Cir.1986) ("The labor-management adjustment boards, created pursuant to 45 U.S.C. § 184, have exclusive jurisdiction over 'minor disputes' . . . ."). Indeed, American removed Sullivan's defamation claim to federal district court for the sole purpose of asking that court to dismiss Sullivan's claim on the basis that the federal court could not hear it.

As this case illustrates, allowing removal to federal court on complete-preemption grounds of state-law claims that also qualify as minor disputes under the RLA is internally inconsistent: the district court must have jurisdiction for removal to be proper, but the court must then dismiss the removed case because only adjustment boards, not federal courts, have primary jurisdiction over claims arising under the RLA. The latter negates the former. None of the three statutes that the Supreme Court has found to completely preempt covered state-law claims suffers from this inconsistency. When a state-law claim is removed to federal court because a section of the LMRA, ERISA, or the National Bank Act preempts it, the district court may then adjudicate the claim on the merits under the relevant preemptive statute. *See Avco*, 390 U.S. at 560-62 (establishing complete preemption under § 301 of the LMRA; upholding the district court's exercise of jurisdiction to dissolve an injunction granted by a state court before removal); *Metro. Life*, 481 U.S. at 61-62, 65-67 (establishing complete preemption under § 502(a) of ERISA; upholding district court's grant of summary judgment on the merits after case was removed from state court); *Beneficial Nat'l Bank*, 539 U.S. at 5, 10 (establishing that state-law usury claims are completely preempted by §§ 85-86

of the National Bank Act; upholding district court's jurisdiction to adjudicate claims once they are recharacterized as claims under the National Bank Act).

Further, the RLA demonstrates that Congress knew how to create federal-court jurisdiction when it wanted to: the RLA provides for limited federal-court review of adjustment boards' decisions in cases involving railroads. 45 U.S.C. § 153(q). Had Congress wished to create a cause of action in federal court solely to determine whether a state-law claim was a minor dispute under the RLA, it could have done so. It did not.

Our conclusion about the lack of complete preemption under the RLA is buttressed by comparison to another type of labor-law preemption, *Garmon* preemption. The National Labor Relations Board (NLRB) has primary jurisdiction, by virtue of 29 U.S.C. §§ 159-60, over claims arising under Sections 7 and 8 of the National Labor Relations Act (NLRA), *id.* §§ 157-58. The Supreme Court held in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-47, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), that neither state nor federal courts have jurisdiction over "activity [that] is arguably subject to § 7 or § 8 of the Act," *id.* at 245. Instead, such claims are committed in the first instance exclusively to the NLRB, just as minor disputes under the RLA must first be brought before adjustment boards. Although the Supreme Court has not addressed the question, "lower courts have uniformly held that defendants may not remove state claims to federal court by alleging *Garmon* preemption." *TKO Fleet Ents. v. District 15, Int'l Ass'n of Machinists & Aerospace Workers*, 72 F.Supp.2d 83, 87 (E.D.N.Y.1999) (collecting cases).[8]

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[8] For a detailed discussion of *Garmon* preemption that supports our analysis, see *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1397-98 (9th Cir.1988).

In holding that there is no complete preemption under the RLA, we align ourselves on one side of a circuit split and follow what seems to be an emerging trend.[9] Because it follows from our holding that the district court lacked subject-matter jurisdiction over this case, we have no occasion to consider the merits of American's argument that the plaintiffs' defamation claims are minor disputes under the RLA that are subject to ordinary preemption. American is free to make this argument in state court and, ultimately, to seek federal-court review by petitioning the Supreme Court for certiorari if American loses in the state courts. *See Franchise Tax Bd.*, 463 U.S. at 12 n. 12 ("[T]he absence of original jurisdiction does not mean that there is no federal forum in which a pre-emption defense may be heard.").

III. CONCLUSION

The RLA commits to arbitral panels, not to federal courts, disputes between airlines and their employees that "grow[ ] out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working con-

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[9] *Compare Roddy v. Grand Trunk W. R.R. Inc.*, 395 F.3d 318, 326 (6th Cir.2005) (finding no complete preemption under the RLA); *Gedde v. Am. Airlines, Inc.*, 321 F.3d 1349, 1357 (11th Cir.2003) (same); *and Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942-43 (3d Cir.1988) (same), *with Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1344-47 (7th Cir.1986) (finding complete preemption under the RLA); *and Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1085 (8th Cir.1989) (same, based on the inaccurate observation that the Supreme Court in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), allowed reliance on the RLA for removal jurisdiction). *See also Adames v. Executive Airlines, Inc.*, 258 F.3d 7 (1st Cir.2001) (case removed on RLA-preemption grounds; no discussion of complete preemption); *Ertle v. Continental Airlines, Inc.*, 136 F.3d 690 (10th Cir.1998) (same); *Kollar v. United Transp. Union*, 83 F.3d 124 (5th Cir.1996) (same); *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 n. 4 (9th Cir.1993) (noting intra-circuit conflict on RLA complete preemption).

ditions . . . ." 45 U.S.C. § 184. Because such disputes cannot be brought in federal court in the first instance, federal courts may not take jurisdiction over them simply to dismiss them on the basis that they are defensively preempted and belong before arbitral panels. We therefore VACATE the judgment of the district court and REMAND with instructions that the case be remanded to state court.